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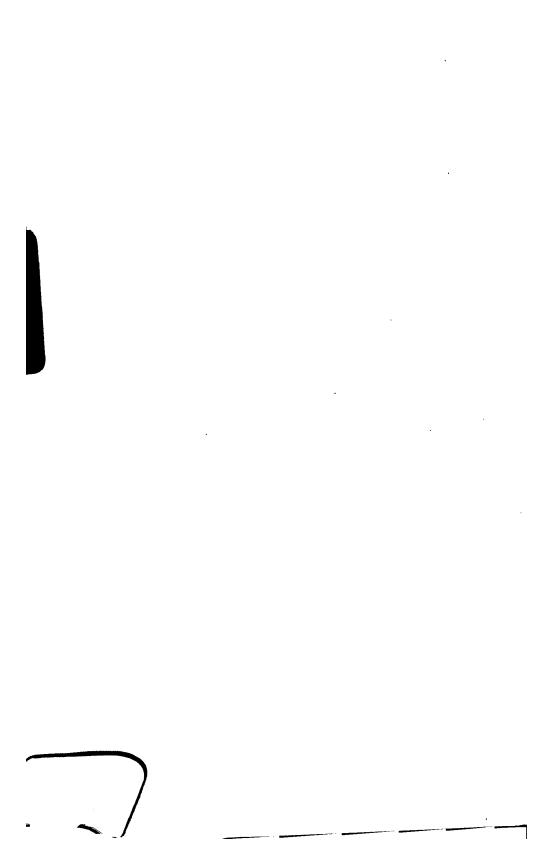
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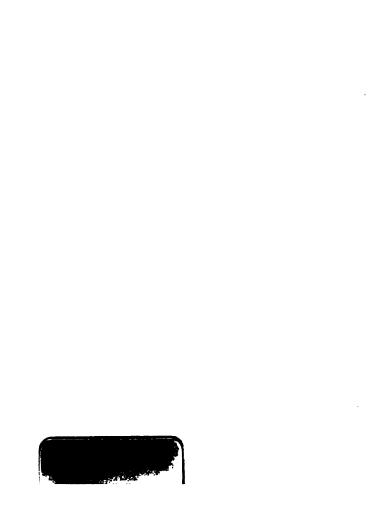
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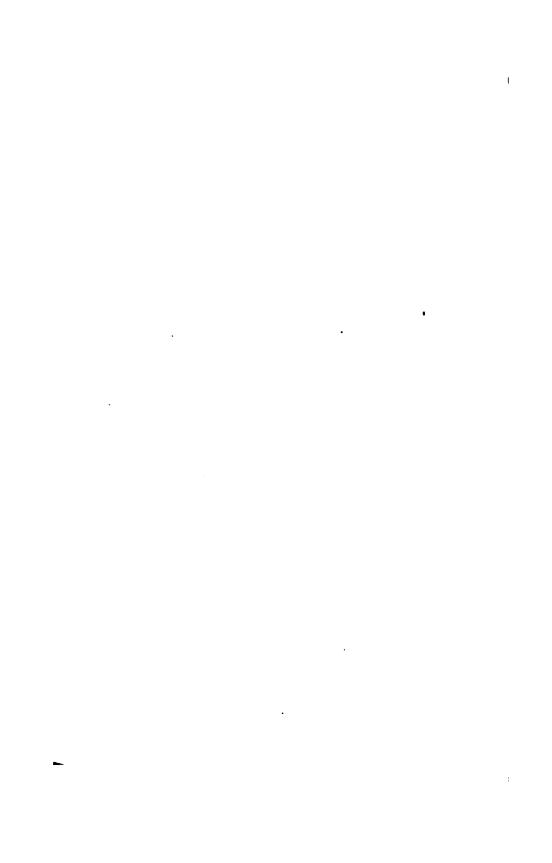
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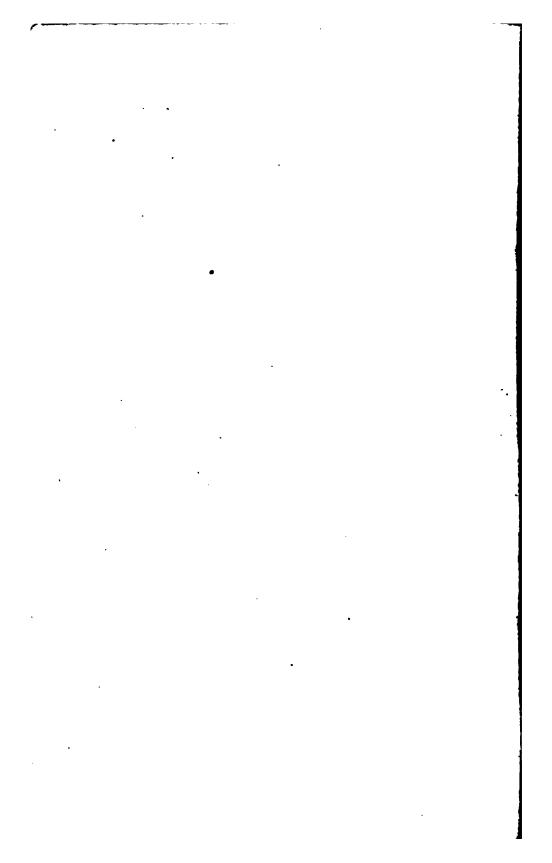






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CONCISE TREATISE

ON

The Kaw

OF

**ARBITRATIONS AND AWARDS:** 

WITH

An Appendix

OF

PRECEDENTS AND STATUTES.

BY

JOSEPH HAWORTH REDMAN,

OF THE MIDDLE TEMPLE, ESQ., BARRETER-AT-LAW; Author of "A Treatise on the Law of Railway Companies as Carriers."

#### LONDON:

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## PREFACE.

THE author's aim in the present work has been to furnish, within the limits of a volume of modest bulk, a concise but complete statement of all points of law and practice affecting arbitrations, from the inception to the final determination of the fate of the award. The necessity for such a book is sufficiently evidenced by the constant complaint of professional men engaged in references, that they have no portable work on the subject. That the author has performed the task of condensation and selection to the satisfaction of all he cannot hope, but he does trust that he has performed it in such a manner as to make the result generally useful.

In the Appendix precedents have been given applicable to the most frequently recurring references; at the same time considerable pains have been taken to frame them so as to be easily adapted to references, where the subject matter, or the relation of the parties, is different. Seeing that the subjects of reference are as multifarious as the causes of civil litigation, it would have necessitated a volume more than double the size of the present to have given forms of awards applicable to all possible varieties of circumstances; the forms contained herein will, however, serve as guides where they cannot be exactly followed as precedents. When the draftsman can find no prece-

dent for the award he wishes to make, he should define clearly to himself what he wishes to direct, ascertain that it is within the limit of his authority, and then direct it to be done in such language as a man of ordinary common sense can understand, and with such exactness that a dishonest party cannot say that it leaves him any doubt as to the how, when and where of performance.

J. H. R.

March, 1872.

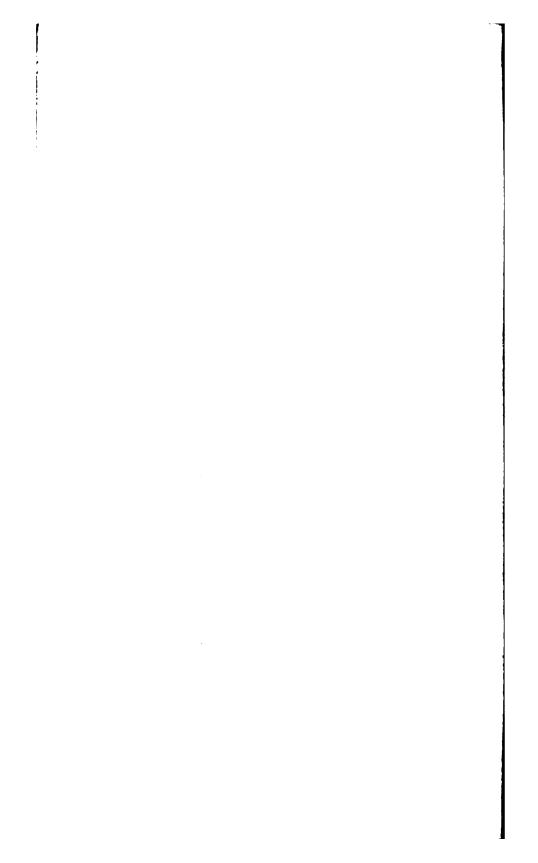
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#### ADDENDA.

Page 19, line 11 \} add—"Where differences arose in a winding up, be, 181, ,, 7 \} tween persons claiming a charge upon a company's estate and the official liquidator, and the parties agreed that their rights should be determined in a summary way by the judge acting in the matter of the winding up, it was held that this was a submission to arbitration by the judge personally, and there was no appeal from his decision as an arbitrator."

(In re Durham Building Society, Ex parte Wilson, 41 L. J., Ch. 164.)

- 30, line 2, add—"Where a bill was filed for winding up a partnership, after an agreement had been entered into to refer the matters to arbitration, it was ordered that proceedings should be stayed till further order, with liberty for both parties to apply if no award were made before a day named; the Lord Chancellor observing that, 'the course of proceedings ought to be the same in these cases here as at law, though no doubt the tendency at law to support every agreement to refer was stronger than in a court of equity, because the latter possessed a machinery by which accounts might be settled, which the former did not possess. Still the parties having come to an agreement to refer, such agreement must be considered binding between them, and ought not lightly to be overturned." (Kitchen v. Turnbull, 20 W. R. 253.)
- clause appointing the architect arbitrator in respect of extra works, and the architect had guaranteed to his employer that the total cost should not exceed a certain sum, but that fact had not been disclosed to the builder at the time he signed the contract, it was held that the guarantee was a material fact tending to influence the architect's decision, and as it was not disclosed to the builder, he was not bound by the submission to the architect's arbitration." (Kimberley v. Dick, 41 L. J., Ch. 38.)
- 81, line 5—Pappa v. Rose is reported L. R., 7 C. P. 82; 41 L. J., C. P. 11.

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## THE LAW

## ARBITRATIONS AND AWARDS.

#### CHAPTER I.

#### INTRODUCTORY.

THAT act by which parties refer any matter in dispute between them to the decision of a third person is called Definitions. a submission; the person to whom the reference is made, an arbitrator; when the reference is made to more than one, and provision is made that, in case they shall disagree, another shall decide, that other is called an umpire; the judgment pronounced by an arbitrator or arbitrators, an award; that by an umpire, an umpirage, or, less properly, an award. (Kyd on Awards, 6.)

At the present day submissions are usually in writing. Matters to be In the framing of a submission great care and precision observed in framing the should be observed, since an unskilful or loosely drawn submission. instrument is often ineffectual to accomplish the purposes for which it was intended, and is seldom unattended with expense or disappointment to some of the parties. The submission should be by an instrument of sufficiently high a nature to enable the arbitrator by his award to accomplish the objects of the reference. Where the reference is under the provisions of a statute, the directions of the statute should be strictly complied with.

CHAP. I.

The submission should be a clear and specific guide to the arbitrator as to the duties he has to perform and the powers with which he is invested. As to the parties, it should embrace all the persons whose concurrence is necessary to make the award a complete determination of the matters in dispute. As to the matters referred, it should, where possible, clearly define the subject-matter of reference, so as to enable the arbitrator to make his award upon the precise matters submitted to him. Since the arbitrator derives his authority from the consent of the parties, the submission should invest him with all such extraordinary powers, both as to the conduct of the reference and the directions in the award. as from the peculiarity of the subject-matter, nature of the dispute, or relation of the parties, may be necessary or useful to enable him to fully investigate and finally determine.

The choice of an arbitrator.

Another matter of vital importance at the outset of a reference, is the choice of an arbitrator. Though, as we shall hereafter see, almost anyone may in ordinary cases be chosen as an arbitrator—so that if parties agree to trust the decision of their disputes to the inexperience of a child or the vagaries of an idiot, such decision, when given, will be binding upon them-too great caution cannot be observed in selecting competent and disinterested persons; for if an incompetent or interested person be chosen, it will seldom happen that he will not through some misconduct, error of judgment, or open display of bias, render his award impeachable. In every case, where the parties can concur in the choice of one person, a single arbitrator is most advis-Nothing has brought more discredit upon the resort to arbitration than the practice of having two arbitrators, one chosen by each party; for unless such

arbitrators are members of the legal profession, it is almost impossible to impress upon them that they are not to a greater or less extent expected to attend to the interests of their respective appointors. Besides, it so often happens that the two arbitrators are unable to agree, and have to leave the decision of matters to the umpire, that it practically amounts to the appointment of a single arbitrator. The nature of the reference will often determine the class of person to be selected as arbitrator, but usually the appointment of a person well versed in the law or equity of the cause of dispute will most satisfactorily attain the objects of the reference,namely, to get speedily, and at a comparatively small cost, such a decision as a court of competent jurisdiction would most probably have given. It does not follow because the dispute involves questions of science, business, or skill, that acknowledged masters in the science, or persons of pre-eminence in the peculiar business or skill should, or indeed could advantageously in all cases, be chosen arbitrators. The assistance of such persons is always attainable by giving their evidence before the arbitrators, in the way in which the evidence of scientific men and experts is usually given in our courts.

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#### CHAPTER II.

#### WHO MAY BE PARTIES TO A REFERENCE.

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Of capacity
to submit
generally.

CAPACITY to enter into a binding submission to arbitration depends upon the same incidents as capacity to contract generally. Every person capable of making a disposition, or release of a right, may submit that right to arbitration. (Com. Dig. "Arb." D. 2.) A person who cannot contract cannot submit to arbitration. (Bac. Ab. "Arb." C.)

Incapacity is either absolute, as in the case of persons attainted, or outlawed, or persons of unsound mind; or partial, as in the case of infants, *femes covert*, and the other classes of persons next considered.

Infanta.

It has long been established, that an infant can make no binding contract except for necessaries; and a submission by an infant is not binding upon him unless he confirms it when he comes of age (Roll. Ab. "Enfant," D. 5; Bac. Ab. "Arb." C.; Godfrey v. Wade, 6 Moore, 488; Dowse v. Coxe, 3 Bing. 20); but a father or guardian may bind himself for an infant's performance of an award in the ordinary way in which one man binds himself for the acts of another. (Roberts v. Newbold, Comb. 318; Gill v. Russell, Freem. 62; Bacon v. Dubarry, 1 Ld. Raym. 246.) If, however, the award direct the performance by the infant of some act of which he is incapable, as the execution of a release, the award will be void (Knight v. Stone, W. Jones Rep. 164); but an award is not bad by reason of its

directing an infant to pay costs. (Proudfoot v. Poile, Chap. II. 15 M. & W. 198; 3 D. & L. 524.)

Every one must be presumed to know the legal disability of infants; therefore if a man of full age bind himself jointly with an infant to perform an award, the disability of the latter will not free the former from his obligation (Com. Dig. "Arb." D. 2; Bean v. Newbury, 1 Lev. 139; Bowyer v. Blorksidge, 3 Lev. 17); and if parties to a suit agree to refer, they cannot defeat the award on the ground that there are infant parties to the suit who are not bound by the award. (Wrightson v. Bywater, 3 M. & W. 199; Jones v. Powell, 6 Dow. 483; Ex parte Wyld, 30 L. J., Bank. 10; In re Warner, 2 D. & L. 148.) Though, as a general rule, equity will not decree an award to bind an infant (Cavendish v. —, 1 Ch. Ca. 279; 2 P. W. 450), yet when an infant is a party to a suit, it will sometimes refer to the master to ascertain whether it would be for the benefit of the infant that the suit should be submitted to arbitration, and will make an order according to the report. (Davis v. Page, 9 Ves. 350.)

A married woman empowered by the custom of the Married city of London to carry on business as a feme sole, may submit matters connected with her business; but the award cannot be enforced except in the city courts. (Beard v. Webb, 2 B. & P. 93; Smith on Contracts, 316.)

A married woman who has obtained a decree for a judicial separation since 20 & 21 Vict. c. 85, may submit; so it is apprehended may a deserted wife who has obtained a protection order. So may the wife of an alien enemy (Barden v. Keverberg, 2 M. & W. 61; De Wahl v. Braune, 25 L. J., Ex. 343; 1 H. & N. 178;—but not of an alien ami, Stretton v. Busnach

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1 Bing. N. C. 139), and the wife of a convicted felon or other person who is civiliter mortuus. (Newsome v. Bowyer, 3 P. W. 37; Sparrow v. Carruthers, cited in Marsh v. Hutchinson, 2 B. & P. 226.)

A married woman entitled to any property under the provisions of "The Married Women's Property Act, 1870," may submit questions in relation thereto to arbitration. (33 & 34 Vict. c. 93, s. 11.)

In the cases above mentioned a married woman's submission would be binding at law. As to property settled to her separate use, a married woman is competent, in equity, to deal with it in all respects as a feme sole (Hulme v. Tenant, 1 Wh. & Tu. Ca. in Equity, 435), and any submission to arbitration in relation thereto would, in a court of equity, be binding upon her.

A married woman may be a party to a submission respecting the adjustment of the terms of her separation from her husband. (See 2 Bright, Husband and Wife, 311.)

Subject to the previous exceptions, a married woman cannot enter into a binding submission. As the chattels real and personal of the wife, whether belonging to her in her own right (Smith v. Ward, Styles, 351; Oglander v. Baston, 1 Vern. 396), or as executrix or administratrix (Lumley v. Hutton, Cro. Jac. 447; Wms. Personal Property, 329; 1 Wms. on Exors. 863), are entirely at the disposal of the husband after marriage, he may submit disputes concerning the same to arbitration, and an award made in the lifetime of the husband will bind the wife after his death. (Com. Dig. "Arb." D. 2.)

As in the case of an infant, so in that of a married woman, everyone must be presumed to be aware of

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her legal disability, and a person who has knowingly entered into a submission with a married woman cannot move to set aside the award on the ground that she is not bound by it. (In re Warner, 2 D. & L. 148.)

Matters touching the freehold property of the wife (not separate estate), may, by a joint reference of husband and wife, be submitted to arbitration. on Awards, 70.) But it seems that the submission should generally be by an acknowledged deed; otherwise the wife will be under no obligation to concur in any conveyance that may be awarded. (See Esdaile v. Stephenson, 6 Madd. 366; 1 Dart, V. & P. 262.)

Though a submission by a party acting under threats Persons acting or imprisonment is generally void, yet if it is afterwards under compulsion. voluntarily acted upon by the party, he taking his chance of a favourable award, he cannot avoid it when the result has turned out to his disadvantage. (Ormes v. Beadel, 30 L. J., Ch. 1.)

Since a submission to arbitration is no part of the Partners. business of a trading concern, one partner cannot, without special authority, bind his copartners by a submission even of matters connected with or arising out of the business of the firm. (Stead v. Salt, 3 Bing. 101; Adams v. Bankhart, 1 Cr. M. & R. 681; Boyd v. Emmerson, 2 A. & E. 184; In re Aldington, 15 C. B., N. S. 375; 2 Lindley on Partnership, 270.) authority need not be in writing, but must be actually given; and an authorization for one partner to sue in the name of himself and the other partner will not be sufficient to empower him, after having brought an action on such authorization, to refer the action and all matters in difference so as to bind the other partner. (Hatton v. Royle, 27 L. J., Ex. 486; 3 H. & N. 500; see also Robertson v. Hutton, 26 L. J., Ex. 293.)

If a man submit on behalf of himself and his partners, he will himself be bound to perform the award. (Strangford v. Green, 2 Mod. 228.) Where, however, an individual partner executes a submission on the faith and understanding that it is to be executed by his copartners, it does not bind him unless the signatures of the rest be procured, as the submission is incomplete. (Antram v. Chace, 15 East, 209; see also Dutton v. Morrison, 17 Ves. 193; Johnson v. Baker, 4 B. & A. 440.)

Persons with joint interests.

When a person submits on behalf of himself and others jointly interested in the matter in dispute, he will be bound though the others will not. (Mudy v. Osam, Litt. 30; Wood v. Thomson, Roll. Ab. "Arb." F. 11.) Where parties agree jointly and severally to refer disputes to arbitration, and bind themselves jointly and severally to perform the award, although their interests are several, yet each is liable to the performance of the award, not only as to what is awarded to be performed by himself, but also by his companions. (Mansell v. Burredge, 7 T. R. 352; Genne v. Tinker, 3 Lev. 24.)

Corporations.

Corporations sole or aggregate may submit to arbitration. (Roll. Ab. "Arb." 2, A. 3.) It is a general rule that a corporation, unless otherwise provided by statute, is not bound by any contract not under its common seal. Therefore a submission to reference by a corporation should either be under the common seal of the corporation, or be entered into in the form and manner directed by the statute which empowers the corporation to contract in some other way.

Executors and administrators.

Executors and administrators, as such, may submit to arbitration matters relating to the personal estate of the deceased (*Elletson v. Cummins*, 2 Stra. 1144; *In* 

re Warner, 2 D. & L. 148), and they will be bound by an award made in pursuance of such submission: but the persons beneficially interested in the fund will not be, for if a less sum than the executors or administrators are entitled to be awarded, the deficiency is a devastavit, and they will have to answer for the full sum (Yard v. Eland, 1 Ld. Raym. 369; 2 Wms. on Exors. 1662.)

A submission to arbitration of a debt alleged to be due to the deceased is not in itself an admission by the executor or administrator of assets (Pearson v. Henry, 5 T. R. 6); though a submission of matters in difference between the deceased and another, without a protest against the reference being taken as an admission of assets, will amount to such an admission, and the executor will be bound to pay any sum awarded. (Robson v. —, 2 Rose, 50; Barry v. Rush, 1 T. R. 691; Riddell v. Sutton, 5 Bing. 209; 2 Wms. on Exors. 1648-50.) He should therefore stipulate against the reference being taken as an admission of assets sufficient to pay what may be the amount of the award. (Worthington v. Barlow, 7 T. R. 453; Love v. Honeybourne, 4 D. & R. 814; Joseph v. Webster, 1 R. & M. 496.)

Trustees may refer matters connected with their trust Trustees. to arbitration, and it has been held that they do not thereby make themselves personally liable. (Davis v. Ridge, 3 Esp. 101; Bristow v. Binns, 3 D. & R. 184.)

The committee of a lunatic may, with the permission Lunatics. of the Court of Chancery having jurisdiction in lunacy, refer the lunatic's interests to arbitration.

A bankrupt cannot submit to arbitration so as to Bankrupts. affect his estate, but his trustee, with the consent of the committee of inspection, may. (32 & 33 Vict. c. 71,

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s. 27.) Though he cannot make a submission binding upon his estate, the submission of a bankrupt is not void, but it will be binding on him personally, and if costs are awarded against him, he may be made to pay them. (*Milnes* v. *Robertson*, 24 L. J., C. P. 29; 15 C. B. 451.)

Agents.

An agent duly authorized may bind his principal by a submission. (Shelf v. Baily, 1 Com. 183; Adams v. Statham, 2 Show. 61.) But the agent should make his submission in the name of the principal, otherwise he, and not the principal, will be bound, notwithstanding he may not have any interest in the matter in dispute. (Bacon v. Dubarry, 1 Ld. Raym. 246.) As the validity of a submission by an agent depends upon the sufficiency of his authorization, the latter should be carefully attended to. If the submission is under seal, the authorization should be in the same manner. (Steiglitz v. Egginton, 1 Holt, N. P. C. 141; Harrison v. Jackson, 7 T. R. 207.)

Sometimes an authority to an agent to refer arises out of his employment, as in the case of an underwriter (Goodson v. Brooke, 4 Camp. 163), or of a consignee of goods. (Curtis v. Barclay, 5 B. & C. 141.) So in the case of an assignee of a contract to do certain works with a power of attorney to take proceedings in the name of the assignor (Hancock v. Reid, 21 L. J., Q. B. 78); and of an assignee of debts with a power of attorney to receive and compound for the same. (Banfil v. Leigh, 8 T. R. 571.) And a power of attorney to A. to act in the dissolution of a partnership, with authority to appoint any other person as he might see fit, was held to give A. power to submit accounts to arbitration. (Henley v. Soper, 8 B. & C. 16; 2 M. & R. 155.)

An agent authorized to refer has the same powers in

the conduct of the reference as his principal would have, and may bind his principal by waiving any objections to irregularities in the proceedings. (Hamilton v. Rankin, 3 De G. & S. 782; Backhouse v. Taylor, 20 L. J., Q. B. 233.)

An attorney in an action at law (Buckle v. Roach, Attornies. 1 Chit. 193; Cayhill v. Fitzgerald, 1 Wils. 28, 58), or his town agent (Griffith v. Williams, 1 T. R. 710; -but not his confidential clerk, Greenwood v. Titterington, 9 A. & E. 699), has power to refer, and can bind his client (Paull v. Paull, 2 C. & M. 235; R. v. Hill, 7 Price, 636) without any express authorization (Thomas v. Hewes, 2 C. & M. 519; Adams v. Bankart, 1 C. M. & R. 681), and even when the client has expressly desired him not to refer (Filmer v. Delber, 3 Taunt. 486; Smith v. Troup, 7 C. B. 757; 18 L. J., C. P. 209); and if by referring the attorney exceed his actual authority the remedy of the client is against him, but he is still bound by the award. It has been held that an attorney may also refer together with the cause all matters in difference. (Dowse v. Coxe, 3 Bing. 20.) He can also consent to an enlargement of time (R. v. Hill, 7 Price, 636), or to making an order a rule of court. (Paull v. Paull, 2 Dow. 340.) If an attorney appear for a corporation with the knowledge of the directors he can bind the corporation by an agreement to refer without being authorized to appear by any authority under seal. (Faviell v. Eastern Counties Rail. Co., 2 Ex. 344; 17 L. J., Ex. 297.)

In Colwell v. Child (1 Ch. Ca. 86) it was held that Solicitors. the assent of a solicitor to a reference by an order of a court of equity will not bind a client without his actual assent. The distinction between attorney and solicitor in this matter is not very obvious, and the above deci-

sion would probably not be followed at the present day. A solicitor has no power by a reference to arbitration to bind infant parties suing by their next friend. (*Biddell* v. *Dowse*, 6 B. & C. 255.)

Counsel.

Though the authority of counsel to refer is a point not free from doubt, and the opinions of the judges have not always been concurrent, it seems that in general a reference by the consent of counsel in a cause will be binding upon the client, at all events at law. (Furnival v. Bogle, 4 Russ. 142; Swinfen v. Swinfen, 25 L. J., C. P. 303; 18 C. B. 485; Chambers v. Mason, 28 L. J., C. P. 10.) But in a case in equity where the client never sanctioned or knew of the reference, a reference by counsel was held not binding. (Swinfen v. Swinfen, 27 L. J., Ch. 35.)

Persons empowered by statute. Persons incapable of referring to arbitration at common law are often enabled to do so by statute. The most important of the enabling statutes is the L. C. C. Act, 1845 (8 & 9 Vict. c. 18), by virtue of which persons under disability, or possessing only limited interests in land affected by public undertakings, are empowered to submit to arbitration questions of compensation for the purchase in fee of, or for damage done to, such land.

## CHAPTER III.

### WHAT MATTERS MAY BE REFERRED TO ARBITRATION.

WHATEVER may be the subject of civil litigation may be referred to arbitration. All disputes between parties Civil matters and all actions at law and suits in equity (Bac. Ab. "Arb." A.),—even a suit for breach of trust in charity, with the consent of the Attorney-General (Att.-Gen. v. Fea, 4 Madd. 274),—may be referred. But on a trial before the sheriff, upon a writ of trial, a verdict cannot be taken subject to an award; for the sheriff is bound to try the cause and cannot delegate his authority. (Wilson v. Thorpe, 6 M. & W. 721.)

The divorce.

A suit for divorce cannot be referred so as to enable Suits for the arbitrator by his award to annul a marriage. power to do so is vested in the Judge Ordinary alone, and no voluntary agreement of husband and wife could confer upon anyone else a like power. But a husband Terms of and wife may refer to arbitration the question whether a sufficient cause for separation does or does not exist, instead of applying to the Divorce Court; and they may bind themselves to abide by the terms of separation awarded by the arbitrator. (Chambers v. Caulfield, 6 East, 244; Rodney v. Chambers, 2 East, 283; Soilleux v. Herbst, 2 B. & P. 444; Bateman v. Ross, 1 Dow. 235; 2 Bright, Husband and Wife, 311.) And where the parties on the eve of trial of a suit by the wife for judicial separation, by reason of cruelty, agreed that the cause should not be moved and that arbitration should be resorted to, the court refused to

allow the petitioner to proceed with the original suit, she having wilfully interposed obstacles to the arbitration. (*Hooper v. Hooper*, 29 L. J., Prob. & M. 59; 1 Sw. & Tr. 602.)

Questions of law and fact.

The decision of bare questions of law or of fact may be referred to arbitration. (Ching v. Ching, 6 Ves. 281; Price v. Hollis, 1 M. & S. 105.) So may the ascertainment of the amount to be paid to contractors for work done (Scott v. Liverpool Corporation, 28 L. J., Ch. 230), or the determination of the price to be paid for the purchase of property (Round v. Hatton, 2 Dow., N. S. 446); and an agreement to sell "at a fair valuation" may be enforced, the court of chancery, if necessary, directing a reference to ascertain the price. (Milnes v. Gray, 14 Ves. 400; 1 Dart, V. & P. 205.)

A mere valuation not an arbitration. (Milnes v. Gray, 14 Ves. 400; 1 Dart, V. & P. 205.) But where there have been no differences between the parties previous to their submission, and the reference is to a person merely to fix a valuation, without conducting any judicial inquiry, it is not strictly a reference to arbitration, nor do the provisions of the 17th section of the C. L. P. Act, 1854, apply to such a case. (Collins v. Collins, 28 L. J., Ch. 184; 26 Beav. 306; Bos v. Helsham, L. R., 2 Ex. 72; 4 H. & C. 642; Wadsworth v. Smith, 40 L. J., Q. B. 118.)

Future differences. Parties may agree to refer future differences, though none at present exist (17 & 18 Vict. c. 125, s. 11); and an arbitrator may make a binding award on the parties to a submission as to their future enjoyment of property or future conduct in relation to the matters in difference. (Wrightson v. Bywater, 3 M. & W. 199; Boodle v. Davis, 3 A. & E. 200.)

Differences respecting wills. Though a testator may provide that questions respecting his property may be submitted to arbitration by his executors or trustees, he cannot provide that if any differences respecting his will arise, they shall be finally determined by an arbitrator named. (Philips v. Bury, Skin. 469.) Disputants themselves, however, may refer to arbitration the construction of a will. (Steff v. Andrews, 2 Madd. 6.)

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Where the subject-matter is clearly illegal (Steers v. Matters illegal Lashley, 6 T. R. 61), or so purely criminal that it can- or purely criminal not not under any circumstances be made the subject of a arbitrable. civil suit (Bac. Ab. "Arb." A.; R. v. Bardell, 5 A. & E. 619; R. v. Hardey, 14 Q. B. 529), or is an offence of a public nature for which no private person can recover compensation (Keir v. Leeman, 6 Q. B. 308; 8 Jur. 824; Edgcombe v. Rodd, 5 East, 294; R. v. Blakemore, 14 Q. B. 544), it cannot be referred.

But matters criminal, for which the injured party has When criminal a remedy by action as well as by indictment, may be referred. (Baker v. Townshend, 1 Moore, 120; 7 Taunt. 422; Keir v. Leeman, supra, per Denman, C. J.) And they may be referred, before indictment, by the simple agreement of the parties; but after an indictment is preferred it seems the consent of the court in which the indictment is pending should first be obtained. (Watson on Awards, 59; Kyd on Awards, 64; Russell on Arbs. 13; R. v. Bardell, 5 A. & E. 619.) The reference may be after as well as before conviction. (Beeley v. Wingfield, 11 East, 46.)

Where a company has entered into an agreement When a referwhich is ultra vires, any agreement to refer disputes ence is ultra arising out of it to arbitration is equally ultra vires. (Maundsell v. Midland Gt. Western Rail. Co., 1 H. & M. 130.)

There are many matters, not otherwise referable to Matters referarbitration, for which special provisions have been made able by statute. by statute.

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Matters of appeal at quarter sessions.

By 12 & 13 Vict. c. 45, s. 12, all orders, rates and other matters, in respect of which notice of appeal to the general or quarter sessions of the peace shall have been given, and for which the remedy is by such appeal (not being a summary conviction or order of bastardy, or any proceedings under the acts relating to the excise, customs, stamps, taxes or post office), the parties, by an order of a judge of the court of queen's bench, may refer to the arbitration or umpirage of any person or persons, and the award may be enforced by attachment or as a judgment of the court of quarter sessions. by sect. 13, after such an appeal has been brought before a court of quarter sessions, such court, with the consent of the parties, may refer it on such terms as the court shall think reasonable, and the award, on application in due time made by either party, may be entered as the judgment of the court of sessions.

Compensation under the L. C. C. Act, 1845.

By the L. C. C. Act, 1845 (8 & 9 Vict. c. 18), persons claiming as compensation or purchase-money more than 50l. (s. 23), in respect of a greater interest than as tenant from year to year (s. 121; R. v. Manchester, &c. Rail. Co., 23 L. T. 287), in lands, of which promoters of public undertakings have given notice of their intention to take (s. 18), or which will be, or have been, injuriously affected by the works (ss. 18 & 68), may, if they desire to have the claim settled by arbitration, and signify such desire in writing to the promoters before they have issued their warrant to summon a jury, and state the nature of the interest and the amount claimed, have it so settled accordingly (ss. 23, 25-37). Questions as to severed lands (s. 94), as to interests omitted to be included (s. 124—6), and as to the price of surplus lands (s. 130), may be decided in like manner. As these clauses are incorporated with the acts of all

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public undertakings requiring the acquisition of land, CHAP. III. they are of extensive practical value.

By the Railways Clauses Act, 1845 (8 & 9 Vict. Matters under c. 20, s. 44), compensation for land taken or used for c. 20. the purpose of any railway, or injuriously affected by its construction, and for damages in respect of such land, are to be ascertained in the manner provided by the L. C. C. Act, 1845. The Railways Clauses Act, 1845, also provides for certain matters therein mentioned (ss. 81, 115, 117) being referred to arbitration under provisions contained in the act (ss. 126—137).

Disputes authorized by any act incorporating the Under 8 & 9 Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), to be settled by arbitration, may be so settled in accordance with the provisions contained in that act (s. 127).

By the Railway Companies Arbitration Act, 1859 Differences (22 & 23 Vict. c. 59), railway companies are empowered way companies. to refer to arbitration matters in which they are mutually interested and which they might lawfully settle amongst themselves (s. 2). And by the Companies Act, 1862 The Compa-(25 & 26 Vict. c. 89, ss. 72 and 73), companies governed by that act are empowered to refer disputes with other companies or persons to arbitration, in accordance with the Railway Companies Arbitration Act, 1859.

nies Act, 1862.

The compensation to be paid for damage sustained Compensation by any person or corporation by reason of the exercise Public Health of the powers of the Public Health Act, 1848 (11 & 12 and Local Government Vict. c. 63), or of the Local Government Act, 1858 Acts. (21 & 22 Vict. c. 98), when the amount in dispute is above 201. (ib. s. 64), is to be decided by arbitration.

under the

Disputes between masters and workmen in trades or Disputes bemanufactures may be settled by arbitration. (5 Geo. 4, tween masters and workmen. c. 96; 1 Vict. c. 67, ss. 1, 2, 3; 8 & 9 Vict. c. 77,

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These enactments do not extend to domestic servants or servants in husbandry.

A number of statutes of less general importance provide for the reference of special disputes, but these it is not proposed to notice in detail.

## CHAPTER IV.

### MODE OF SUBMISSION.

## A SUBMISSION to arbitration may be:-

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- 1. By mutual agreement between the parties;
- 2. By order of court or of a judge;
- 3. Compulsory under the C. L. P. Act, 1854; or,
- 4. In the manner prescribed by particular statutes.

# SECT. 1.—Submission by Mutual Agreement.

In all cases, whether a cause be pending or not, In what cases parties may submit their disputes to arbitration by any agree to subagreement between themselves clearly expressing an mit. intention to make the decision of the arbitrator conclusive.

Submissions by agreement may be either (1) by In what manparol, (2) by writing not under seal, (3) by mutual ner. bonds conditioned for the performance of the award, or, (4) by indenture; and may be contained in a formal agreement of submission or in a clause collateral to the principal objects of an instrument.

A parol submission, though perfectly valid, is Parol subattended with many disadvantages, since it cannot be
made a rule of court even by consent of the parties
(Ansell v. Evans, 7 T. R. 1; Godfrey v. Wade, 6
Moore, 488; Ex parte Glaysher, 34 L. J., Ex. 41);
and it is often ineffectual to accomplish the objects of
the reference, for if the subject-matter of reference is
any interest in land, an award founded on a parol submission cannot be enforced as not complying with the

fourth section of the Statute of Frauds. (Walters v. Morgan, 2 Cox, 369; Rainforth v. Hamer, 25 L. T. 247.)

Submission by deed which one party executes and the other only signs. It is no objection to a submission that one party is bound by deed and the other by simple contract, as in a reference between a private individual and a corporation, which the former only signs but to which the seal of the latter is affixed. (Tomlin v. Mayor of Fordwich, 5 A. & E. 147.)

When a submission under seal is necessary. Where the reference involves differences relative to an act to be perfected by deed, the submission should be by deed; thus where it is agreed that a partnership shall be dissolved by deed, a submission to arbitration respecting partnership differences should be under seal to make an award dissolving the partnership valid. (*Hutchinson* v. Whitfield, Hayes (Ir. Ex.), 78.)

Stamps.

If the submission is by an agreement not under seal, it will require a 6d. stamp; if by bond, a bond stamp; if by deed, a 10s. stamp.

Arbitration no bar to legal proceedings.

A submission to arbitration will not bar legal proceedings, and even the commencement and actual pendency of an arbitration respecting a right of action. before an award is made, is no answer to an action in respect of the same matter (Harris v. Reynolds, 7 Q. B. 71; Livingston v. Ralli, 24 L. J., Q. B. 269),—not even upon equitable grounds (Wood v. Copper Miners Co., 17 C. B. 561; 26 L. J., C. P. 166);—nor to a suit in equity. (Nichols v. Chalie, 14 Ves. 265; Cooke v. Cooke, L. R., 4 Eq. 77.) The effect of a stipulation in a submission, in which the arbitrators are named, that no proceedings in law or equity shall be brought in respect of the matters agreed to be referred is a point not free from doubt. Lord Kenyon and Lord St. Leonards have respectively (Halfhide v. Fenning, 2 Bro. C. C. 336; Dimsdale v. Robertson, 2 J. & Lat. 58)

allowed such an agreement as a bar to proceedings CHAP. IV. contrary thereto; and though the latter decision has been adversely commented upon (Scott v. Corporation of Liverpool, 3 De G. & J. 334; 28 L. J., Ch. 230), it has not been expressly overruled, and was in some degree assented to by the present Lord Chancellor in Cooke v. Cooke (L. R., 4 Eq. 77), who observed that the question remains in dubio. But it is not possible to reconcile the two former cases with the decision in Lee v. Page (30 L. J., Ch. 857), and, until they are confirmed by some other court, they must be regarded as very doubtful law. The point is now, however, one Proceedings of very little importance, since, even in the absence of a covenant not to sue, the court will generally, upon application, stay any proceedings brought in respect of matters agreed to be referred. (17 & 18 Vict. c. 125, s. 11; infra, p. 26.)

A person will be liable to an action for breach of Refusal to contract if he refuses to enter into an arbitration after refer, breach of contract. having agreed to do so. (Livingston v. Ralli, 24 L. J., Q. B. 269; Webb v. Taylor, 1 D. & L. 676.)

For attaining the full beneficial effect of an award, it Submissions is often of great importance that a submission should be which may be made rules of made a rule of court. To enable parties to do this, it court. was enacted by 9 & 10 Will. 3, c. 15, s. 1, that persons desiring to end any controversy, suit, or quarrel, for which there is no other remedy but by personal action or suit in equity, may by arbitration agree that their submission of their suit to the award or umpirage of any person shall be made a rule of any of his Majesty's courts of record, and insert the agreement in the submission, which may, on affidavit of the witnesses thereto, be made a rule of court and enforced by the usual means. Under this statute, and prior to the C. L. P.

Act, 1854, it was necessary to insert in the submission the consent clause for making it a rule of court, otherwise it could not be so made, and the person refusing to perform the award could not be proceeded against by attachment. Though the consent clause is of less importance now than formerly, it should never be omitted; for, as we shall see hereafter, a submission containing a consent clause possesses numerous advantages over one which does not.

17 & 18 Vict. c. 125, s. 17.

The C. L. P. Act, 1854, s. 17, provides as follows: "Every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior courts of law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of court; and if in any such agreement or submission it is provided that the same shall or may be made a rule of one in particular of such superior courts, it may be made a rule of that court only; and if, when there is no such provision, a case be stated in the award, for the opinion of one of the superior courts, and such court be specified in the award, and the document authorizing the reference have not, before the publication of the award to the parties been made a rule of court, such document may be made a rule only of the court specified in the award; and when in any case the document authorizing the reference is or has been made a rule or order of any one of such superior courts, no other of such courts shall have any jurisdiction to entertain any motion respecting the arbitration or award."

Matters within the statute.

To come within the meaning of the section, the reference must be respecting some matter in controversy.

Thus, where the matter to be decided is one of mere CHAP. IV. valuation, left to the uncontrolled decision of some third person, it is not within the section, and cannot be made a rule of court (Collins v. Collins, 26 Beav. 306; Bos v. Helsham, L. R., 2 Ex. 72; Wadsworth v. Smith, 40 L. J., Q. B. 118; L. R., 6 Q. B. 332); but where, in ascertaining the value or compensation, the matter assumes the character of a judicial inquiry, to be conducted upon the ordinary principles upon which judicial inquiries are conducted, by hearing the parties and the evidence of their witnesses, the reference is within the meaning of the section. (Re Hopper, L. R., 2 Q. B. 367.) A covenant by indenture that any difference which may thereafter arise between the parties touching certain matters shall be and are thereby referred to an arbitrator named, constitutes a submission to reference within the section (Parkes v. Smith, 15 Q. B. 297); and so if the arbitrator is not named, but is to be afterwards appointed, provided the appointment is in But we have seen that a parol submission cannot be made a rule of court (ante, p. 19), and where two persons agreed by deed to refer all matters in dispute which should arise between them to two arbitrators, one to be chosen by each party, and on disputes arising arbitrators were appointed by parol, it was held that the submission was by parol and could not be made a rule of court (Ex parte Glaysher, 3 H. & C. 442; 34 L. J., Ex. 41); but in a similar case, where one of the parties to the deed had appointed an arbitrator in writing, and on the other party making default in appointing a second arbitrator, the arbitrator so appointed proceeded with the inquiry and made his award, the submission was allowed to be made a rule of court. (Re Newton v.

Hetherington, 19 C. B., N. S. 342; and see Re Willcox and Storkey, L. R., 1 C. P. 671.)

The section does not apply where, by the terms of the submission, the arbitrator is to have power to require the parties to enter into bonds of submission or rules of court. (*Fitzwilliam v. Dawes*, 4 L. T., N. S. 408.)

When a submission is made a rule of court. It is not usual to make the submission a rule of court until it is necessary to do so for the purpose of giving the court jurisdiction to enforce the award, or set it aside, or the like. The court has no jurisdiction, even by consent, to set aside or enforce an award until the submission has been made a rule of court. (Owen v. Hurd, 2 T. R. 463; Re Ross, 4 D. & L. 648.)

Agreements to refer future differences.

It is a common practice among conveyancers to insert in partnership deeds, leases, contracts for works and other instruments relating to contracts, the performance of which lies mainly in futuro, covenants or agreements providing that any differences or disputes thereafter arising between the parties shall be referred to Agreements of this kind do not deprive arbitration. the courts of jurisdiction over the matters agreed to be referred; nor will the addition of a covenant not to sue in respect of such matters prevent either party from bringing them into court (Horton v. Sayer, 4 H. & N. 643; Lee v. Page, 30 L. J., Ch. 857); for such a covenant is an agreement to oust the jurisdiction of the courts, and it is established that, on grounds of public policy, any agreement to oust the jurisdiction of the courts is void. (Broom, Com. 44.) But, though an agreement to refer future differences, followed by a covenant that the parties shall not prosecute any suit or seek any remedy on such differences without first submitting to arbitration, is ineffectual for the purpose of barring access to the courts, yet the same result may be effected, A reference and the technical difficulty of "ousting the jurisdiction made a condition precedent of the courts" avoided, by an agreement to refer, fol- to a right to lowed by a covenant that no cause of action or right to sue shall accrue to either party until a third person has decided on any differences that may arise between himself and the other party to the covenant (Scott v. Avery, 5 H. of L. Ca. 812; Scott v. Corporation of Liverpool, 28 L. J., Ch. 230; Brown v. Overbury, 11 Ex. 715; Westwood v. Secretary of State for India, 1 N. R. 262; Braunstein v. Accidental Death Insurance Co., 31 L. J., Q. B. 17; Tredwen v. Holman, 31 L. J., Ex. 398; Elliott v. Royal Exchange Assurance Co., L. R., 2 Ex. 237; Alexander v. Mendl, 22 L. T., N. S. 609); thus making the resort to arbitration a condition precedent to any right of action arising. But the terms of an agreement will not be unduly strained, so as to make the resort to arbitration a condition precedent to a right of action in respect of such matters as may not reasonably be supposed to have been contemplated by the parties. Where a building contract contained a clause that, in case of difference between the contractor and his employer, the award in writing of the architect, in all matters connected with the works or their execution, or the value of extra work, or reductions, or the meaning of the plans or specifications, should be a condition precedent to any proceeding whatever at law or in equity in respect of any matter or thing which could or might be the subject of such award; it was held, that the architect's award was not a condition precedent to an action by the employer against the contractor for not completing the buildings

and for leaving them unfinished. (Mansfield v. Doolin, 4 Ir. R., C. L. 17.)

Proceedings contrary to an agreement to refer stayed.

17 & 18 Vict. c. 125, s. 11.

Even where an agreement to refer contains no provision against the accrual of a right to sue until arbitration has been resorted to, legal proceedings will seldom be permitted to be carried on now in respect of matters within the scope of such an agreement, for upon proceedings being commenced by the one party, the other may, under the C. L. P. Act, 1854, apply to stay them. Sect. 11 of that act provides as follows:--" Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the court in which action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise

as to such court or judge may seem fit: provided always, CHAP. IV. that any such rule or order may at any time afterwards be discharged or varied as justice may require."

This section does not give to an agreement to refer Effect of the the effect of depriving a plaintiff of his right of action, but it enables the defendant to take advantage of the agreement by application to stay proceedings in the action, and compel the plaintiff to resort to his remedy by arbitration. (Roper v. Lendon, 1 E. & E. 825.)

The jurisdiction of the court, given by the above section, is not restricted to the time of the award, but when the order for reference contains no order as to the costs of the action, the court has power to make such an order, though the arbitration is closed. (Bustros v. Lenders, 19 W. R. (C. P.) 757.)

In Blythe v. Lafone (1 E. & E. 435; 28 L. J., Its application Q. B. 164), it was held, that this section does not give where differences arise power to stay proceedings in an action upon a deed or on one instruinstrument, unless the deed or instrument contains an agreement to agreement to refer differences, though the parties have another. made such an agreement in writing subsequently to the differences arising. But this decision has been dissented from (Mason v. Haddon, 6 C. B., N. S. 526), and probably would not now be followed. In Hattersley v. Hatton (3 F. & F. 116), where the parties had gone on dealing upon the terms of a former and satisfied agreement which contained a clause for reference, it was held to be within the statute.

ment and the

The exercise of the jurisdiction is a matter of discre- When proceedtion with the court (Wickham v. Harding, 28 L. J., ings will be stayed. Ex. 215), and to entitle the defendant to a stay of proceedings he must make out, in the first place, that there is an agreement to refer, and, in the next place, he must satisfy the court that "no sufficient reason exists why

such matter cannot or ought not to be referred." (Mason v. Haddon, supra.) But proceedings will be stayed whenever the application is made bond fide by a party who has always been ready to refer, and the only matters in dispute are within the meaning of the agreement. (Wheatley v. Westminster Brymbo Colliery Co., 2 Dr. & Sm. 347.) They will not be stayed where the object of the defendant is merely to delay the plaintiff (Lury v. Pearson, 1 C. B., N. S. 639), or where the arbitrator would not have power completely to deal with the case (Cook v. Catchpole, 34 L. J., Ch. 60; 10 Jur., N. S. 1068), or the case is one of fraud (Wallis v. Hirsch, 1 C. B., N. S. 316), or the reference agreed upon is not adapted to the special circumstances (Hirsch v. Im Thurm, 4 C. B., N. S. 569; 27 L. J., C. P. 254), or where in consequence of some of the contemplated parties not having entered into the agreement, it would be contrary to the intention of the parties to refer the matter in dispute to arbitration. (Mason v. Haddon, 6 C. B., N. S. 526.)

Meaning of "then existing or future differences." The terms "any then existing or future differences" include all differences arising out of the contract and within its scope, and are not confined to the very subject-matter of the action itself in which the court or a judge is applied to, to stay proceedings; thus, where an action was brought for a liquidated demand for freight, on a charter party which provided that any differences of opinion in principle or detail should be referred, and there was a counter claim for unliquidated damages arising out of the same instrument for breach of an alleged implied warranty of seaworthiness, the Queen's Bench stayed the action, though it was admitted there was no legal defence to the liquidated claim. (Russell v. Peligrini, 6 E. & B. 1020; 26 L. J., Q. B. 75.)

Though this decision was disapproved in the Exchequer (Daunt v. Lazard, 27 L. J., Ex. 399), it has since been followed in the Common Pleas. (Seligmann v. Le Boutillier, L. R., 1 C. P. 681.) So an action for a wrongful dismissal on a contract of hiring to superintend a business, which provided that any differences in respect to the business or otherwise, or any matters connected with or in relation to the contract, should be decided by two persons, was held to be within the agreement to refer, and the action was stayed. (Wichham v. Harding, 28 L. J., Ex. 215.)

Differences of law, as well as of fact, if within the agreement for reference, fall within this section. (Randegger v. Holmes, L. R., 1 C. P. 679; Willesford v. Watson, 20 W. R. 32.)

The trustee of a bankrupt is not a person claiming "through or under" one of the parties to a reference, within the meaning of the act, and the court will not stay proceedings commenced by the trustee in respect of matters agreed to be referred by the bankrupt. (*Pennell v. Walker*, 26 L. J., C. P. 9; 18 C. B. 651; and see *Sturgis v. Curzon*, 21 L. J., Ex. 38.)

A court of chancery will not enforce specific performance of an agreement to refer future differences to arbitration (Agar v. Macklow, 2 S. & S. 418), nor refer not enforced.

substitute the master for an arbitrator. (Ib.) And such an agreement is no plea to a bill brought in consequence of such differences. (Wellington v. M. Intosh, 2 Atk. 569.) Where a bill is filed in respect of matters agreed to be referred to arbitration, the proper course is for the defendant, after appearance, but before plea or answer, to apply to the court to stay proceedings under sect. 11, C. L. P. Act, 1854. (1 Dan. Ch. Pr. 619.) And the courts of chancery will be governed by

CHAP. IV. the same considerations as the courts of common law in exercising this jurisdiction.

Jurisdiction of courts ousted by statute.

Many acts of parliament contain arbitration clauses, ousting the courts of their jurisdiction. An agreement to refer under sect. 2, Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59), is, under sect. 26, obligatory upon and ousts the jurisdiction of the courts of chancery. (Watford Rail. Co. v. London and North Western Rail. Co., 38 L. J., Ch. 449.)

SECT. 2.—Submission by Order of Court or of a Judge.

Pending actions referred by rule of court or judge's order. Matters which are the subject of a pending action in one of the superior courts at Westminster may, by consent of the parties, be referred to arbitration, before the action is called on for trial by a rule of court made in the cause or by order of one of the judges, after it has been called on and the jury sworn by order of nisi prius, with or without a verdict being taken, as the parties may think proper. (2 Lush's Practice, 1037; 2 Chit. Arch. 12th ed. 1632.)

Such references only when an action pending. If no action be pending, the courts have no jurisdiction over the matters, and the parties cannot refer by rule or order (R. v. Hardey, 14 Q. B. 529); but if there be an action pending any other matter in difference de hors the cause may be comprehended in the rule or order of reference. (Bonner v. Charlton, 5 East, 139.) And a person not a party to the action may, by consent, be made a party to the reference, and will be bound by it and cannot retract it. (Williams v. Lewis, 7 E. & B. 928; Rogers v. Stanton, 7 Taunt. 575, n.)

Reference on the "usual terms." A reference by judge's order or rule of nisi prius is very often made on "the usual terms." These are well

known terms which are embodied in a printed form of CHAP. IV. order used by the associates. If it is necessary, such other terms, not included in the printed form, as may be agreed upon are added.

To prevent an award being set aside through the Order should arbitrator's omission to decide each issue where costs arbitrator from abide the event, a clause is often inserted in orders of deciding each issue. nisi prius, that it shall be sufficient for the arbitrator to find in the cause generally, unless either party shall request him to decide some particular issues. v. Thomas, 9 Jur. 92.)

The order to refer should also contain a clause to and should stay stay proceedings in the action; and if the award is proceedings. likely to be under 201., or to be such as if the cause had been tried would require the certificate of the judge to give the parties costs, power should be given to the arbitrator to certify in the same manner as a judge might have done.

An order of nisi prius may be made a rule of court Orders of nisi (Millington v. Claridge, 3 C. B. 609; Harrison v. judge's orders Smith, 1 D. & L. 876); so may a judge's order re- made rules of court. ferring a cause. (2 Chit. Arch. 12th ed. 1641.) An order of reference with the appointment of umpire and two enlargements of the time for making the award endorsed thereon, having been accidentally destroyed, the court (on payment of costs) allowed a duplicate ofthe order, together with copies of the endorsements on the originals, verified by affidavit, to be made a rule of court. (Parker v. Bach, 17 C. B. 512.) Where there is a reference by judge's order, and the costs of the action and of the reference are left in the discretion of the arbitrator, the costs of making the order a rule of court are in the discretion of the court, and will not be allowed unless deemed necessary; nor will they be

deemed so if the order has been made a rule of court without a previous demand of the money awarded. (Carter v. The Burial Board of Tonge, 5 H. & N. 523; 29 L. J., Ex. 293.)

Of what court the order may be made a rule.

Where a number of actions, pending in different courts, are referred by one agreement containing a consent that it may be made a rule of either of the different courts, and it is made a rule of one of them, an application will be refused to make it a rule of another. (Winpenny v. Bates, 1 Dow. 559.) And it may be provided in a cause referred by judge's order, that the order may be made the rule of another court; if so, the latter court will make the order a rule of that court. (Milstead v. Craufield, 9 Dow. 124.)

Suits in equity may be referred; A court of equity, upon consent of the parties, will order the matters in question in a suit to be referred to arbitration. The court will not, however, give directions as to the carrying on of the reference (Houghton v. Bankart, 3 De G., F. & J. 16), and if it fails the suit will proceed as if it had not been directed. (Crawshay v. Collins, 3 Swanst. 90.)

and suits in the county court. The judge of a county court may, with the consent of both parties, order a suit before him, with or without other matters in difference (within the jurisdiction), to be referred to arbitration to a person or persons, in such manner and on such terms as he thinks reasonable and just (9 & 10 Vict. c. 95, s. 77; 19 & 20 Vict. c. 108, s. 23), and such reference cannot be revoked by either party except by consent of a judge. The award of the arbitrator is to be entered as the judgment in the cause. (9 & 10 Vict. c. 95, s. 77; Pollock & Nicol's Co. Ct. Pr. 7th ed. 256.)

# SECT. 3.—Compulsory Reference.

By the common law of England there is no power of Compulsory compelling persons to refer. For obvious reasons of reference by public policy, the C. L. P. Act, 1854, has introduced provisions for the compulsory reference of actions where the disputes are regarding mere matters of account.

Sect. 3 is as follows:—"If it is made to appear, at any time after the issuing of the writ, to the satisfaction of the court or a judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such court or judge, upon such application, if they or he think fit to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the court, or, in country causes, to the judge of any county court, upon such terms as to costs and otherwise as such court or judge shall think reasonable; and the decision or order of such court or judge, or the award or certificate of such referee shall be enforceable by the same process as the finding of a jury upon the matter referred."

Sect. 6 provides that "if upon the trial of any issue of fact by a judge under this act, it shall appear to the judge that the questions arising thereon involve matter of account which cannot conveniently be tried before him, it shall be lawful for him, at his discretion, to order that such matter of account be referred to an arbitrator appointed by the parties, or to an officer of the court, or, in country causes, to a judge of any county court, upon such terms, as to costs and otherwise, as such judge shall think reasonable; and the award or certifi-

cate of such referee shall have the same effect as hereinbefore provided as to the award or certificate of a referee before trial; and it shall be competent for the judge to proceed to try and dispose of any other matters in question not referred, in like manner as if no reference had been made."

The power to refer causes to county court judges, under the above sections, is now repealed. (21 & 22 Vict. c. 74, s. 5.)

At what times a reference may be compelled. Sect. 3 does not empower a judge to compel a reference of a cause at trial, but only before trial (Robson v. Lees, 6 H. & N. 258; 30 L. J., Ex. 235; sed quære, Jeffries v. Lovell, 19 W. R. 408); and the 6th section only applies where a judge is trying a cause without a jury, so that the power cannot be exercised after the jury is sworn. (Jeffries v. Lovell, supra.)

In what cases.

Where the matters in dispute consist in part only of matters of account, the court or a judge may order the whole or part only of the matters to be referred. (Browne v. Emerson, 25 L. J., C. P. 104; 17 C. B. 361; Reece v. Chaffers, 11 W. R. 307; Murray v. Sunderland Dock Co., 1 F. & F. 179.) And the whole may be referred although a question of fraud is involved. (Imhof v. Sutton, L. R., 2 C. P. 406.) Even where a question of fraud arises upon the inquiry before the referee he must still proceed. (Insull v. Moojen, 3 C. B., N. S. 359; 27 L. J., C. P. 75.) Whether the action can be referred as being one of mere account, is a question to be determined by reference to the pleadings and particulars only. (Stafford Gas Co. v. Ratcliffe, 19 W. R. 776; L. R. 6 Ex. 224.)

An action for dilapidations where money is paid into court, and the question in dispute is only as to the amount of damages is a matter of mere account within

the statute (Cummins v. Birkett, 3 H. & N. 156; 27 L. J., Ex. 216; Pell v. Addison, 2 F. & F. 291; Angell v. Felgate, 7 H. & N. 396; 31 L. J., Ex. 41); but it has been doubted whether an action on a bond where there is only a plea of payment is (Chapman v. Van Toll, 8 E. & B. 396; 27 L. J., Q. B. 1); and in an action on some bills of exchange against the drawer who had admitted drawing the bills, the court refused to order a reference considering the matter in difference not one of account, and nothing being shown that it could not conveniently be tried in the ordinary way. (Pellatt v. Markwick, 3 C. B., N. S. 760.) But where the claim was partly for matters of account, and also to recover back money paid as commission on orders alleged to be fictitious, the judge having referred the case, the court held that he had jurisdiction to do so. (Imhof v. Sutton, L. R., 2 C. P. 406; 36 L. J., C. P. 130.) An action in which either the terms of an agreement declared on, or the nature of the pleadings, necessarily involve matters of account will be referred, and a cross claim for security will also be referred. (Jones v. Beaumont, 1 F. & F. 336.) No power is given to order a reference of the cause and of "all matters in difference." (Kendil v. Merrett, 25 L. J., C. P. 251; 4 W. R. 594.)

A compulsory reference may be set aside if there is Setting aside no dispute as to amount but only as to liability. (Brown reference. v. Girard, 19 L. J., Ex. 324.) But where the plaintiff assents to and has the carriage of an order to refer a suit as involving matters of account, he cannot after some delay apply to rescind the order on the ground that it is not a matter of mere account. (Rogers v. Kearns, 29 L. J., Ex. 328.)

The court has no more power to set aside an award, A compulsory or remit a case back to the arbitrator, where the re-

dents as one by consent. ference is compulsory under this act, than where the reference is by consent. (Hogg v. Burgess, 27 L. J., Ex. 318.) And in such a reference the arbitrator is governed by the same rules as in an ordinary arbitration (Holloway v. Francis, 9 C. B., N. S. 559; Insull v. Moojen, 3 C. B., N. S. 359; 27 L. J., C. P. 75), and his opinion upon questions both of law and fact is as binding on the parties as in a voluntary reference. (Baguley v. Markwick, 30 L. J., C. P. 342; S. C. nom. Baggalay v. Borthwick, 10 C. B., N. S. 61.)

Notwithstanding a compulsory reference the cause still remains in court. (*Edwards* v. *Edwards*, 28 L. J., C. P. 25.)

Power of the court of chancery to restrain actions not affected by the act.

Compulsory references at quarter sessions. The Court of Chancery will still restrain actions at law where the accounts are complicated and can more readily be taken in chancery. (Croskey v. European and American Steam Co., 1 J. & H. 108.)

Power is given to the Court of Quarter Sessions compulsorily to refer appeals under the Land Drainage Act, 1861 (24 & 25 Vict. c. 133, ss. 48, 49), and the Highway Act, 1864 (27 & 28 Vict. c. 101, ss. 40, 41), when they consist wholly or in part of mere matters of account, and the above provisions of the C. L. P. Act, 1854, apply to such references.

SECT. 4.—Submission under particular Statutes.

Enactments empowering the reference to arbitration of particular matters usually indicate the mode of submission.

Submission under the L. C. C. Act, 1845.

The mode of referring matters authorized under the L. C. C. Act, 1845, is thus pointed out by sect. 25:—
"When any question of disputed compensation by this

or the special act, or any act incorporated therewith, authorized or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred; and every appointment of an arbitrator shall be made on the part of the promoters of the undertaking under the hands of the said promoters or any two of them, or of their secretary or clerk, and on the part of any other party under the hand of such party, or if such party be a corporation aggregate under the common seal of such corporation; and such appointment shall be delivered to the arbitrator, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such lastmentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbitrator shall be final."

The submission may be made a rule of any of the May be made superior courts, either of law or equity, on the applica-

tion of any of the parties. (Sect. 36; and see *Hawley* v. North Staffordshire Rail. Co., 2 De G. & S. 33; Re Ware, 9 Ex. 395; 23 L. J., Ex. 145.)

Preliminary forms only required in compulsory cases. If both parties concur in the appointment of an arbitrator, all that is necessary is that the appointment should be signed by the secretary of the company; a strict compliance with the various preliminary steps only being required when the reference is compulsory. (Collins v. South Staffordshire Rail. Co., 21 L. J., Ex. 247.)

Steps to be taken before nominating an arbitrator,

If the amount claimed is not paid or agreed to be paid within twenty-eight days (s. 68), it is the duty of the claimant (and of the promoters also) to endeavour to procure the appointment of a single arbitrator before nominating an arbitrator on his own behalf. Mayor of Blackburn, 29 L. J., Ex. 447.) If unsuccessful in this attempt, he should appoint an arbitrator himself and notify the appointment to the other party, and request them in writing to appoint an arbitrator on their part. (Bradley v. Lond. and North Western Rail. Co., 5 Ex. 769.) Should they fail to do so for fourteen days he may then appoint an arbitrator to act for both The reason of the notice is to afford the other parties. side an opportunity to acquiesce in the appointment already made. (1b.) The notice should be in express terms; it is not sufficient to state an intention of appointing, but an actual appointment should be made and delivered to the arbitrator and notice thereof given to the promoters. (1b.)

How companies should appoint an arbitrator. The company's appointment is required to be under the hands of the "promoters or any two of them," or of their secretary or clerk (s. 25). It ought to be made under the hands of the secretary, for the word "promoters" refers to the company; but it is difficult to say who are two of the company. If the interpretation Chap. IV. clause had included the word "directors" in the word "promoters" this difficulty would not have arisen. (See Ingram on Compensation, 138; Lloyd on Compensation, 115.)

Though neither party may revoke the submission When submiswithout the consent of the other, yet, if it clearly sion may be revoked. appear that the arbitrator or umpire is about to exceed his jurisdiction, the court may interfere on an application to revoke the submission. (Faviell v. Eastern Counties Rail. Co., 17 L. J., Ex. 223.)

A submission under this act may, by consent, be made to embrace incidents and impart powers not included in a reference which proceeds simply on the statutory clauses (Caledonian Rail. Co. v. Lockhart, 3 Macq. 808); but if it does, it cannot be made a rule of court under sect. 36. (In re Ware, 9 Ex. 395; Dawson v. York and North Midland Rail. Co., 9 Ex. 401.) And if the parties agree that two persons named shall nominate the arbitrator, instead of doing so themselves, it will not be a reference under the statute, though it may be on the terms of it. (Martin v. Leicester Waterworks Co., 3 H. & N. 463.)

Provisions are also made in the Railways Clauses Act, Submissions 1845 (8 & 9 Vict. c. 20, s. 126); the Companies Clauses statutes. Act, 1845 (8 & 9 Vict. c. 16, s. 128); the Public Health Act, 1848 (11 & 12 Vict. c. 63, s. 123), and other statutes, as to the mode of submitting matters, by those statutes respectively authorized to be referred.

Submissions under the Railway Companies Arbitration Act, 1859, must be in writing under the common seals of the submitting companies. (22 & 23 Vict. c. 59, s. 2.)

## CHAPTER V.

#### WHAT MATTERS ARE INCLUDED IN A SUBMISSION.

CHAP. V. A SUBMISSION should be distinctly framed so as to embrace all matters, and those only, which the parties mean to refer.

General reference includes all disputes.

A general submission of "all matter in difference between the parties," will empower the arbitrator to adjudicate on all disputes affecting their civil rights (Baker v. Townsend, 7 Taunt. 422); even on rights in autre droit, such as claims in their capacity as executors or administrators, or in behalf of their wives. (Elletson v. Cummins, 2 Stra. 1144; Morse v. Sury, 8 Mod. 212; Lumley v. Hutton, Cro. Jac. 447.) So a reference in a cause of "all matters in dispute between the parties" will be a general submission; while a submission of "all matters in dispute in the cause" is confined to matters actually in dispute in the cause. (Malcolm v. Fullarton, 2 T. R. 645; Smith v. Muller, 3 T. R. 624, 626, per Buller, J.) A submission of "all debts and demands" comprehends all, whether by simple contract or specialty. (Roberts v. Mariett, 2 Saund. 190.) A submission of "all actions" extends only to actions pending, and not to causes of action (1 Co. Litt. s. 492); but "actions and complaints" would include the latter. (Com. Dig. "Arb." D. 4.)

Not controlled by specific recital.

A submission of all matters in difference is not controlled by a recital of some specific matters. (Charlton v. Spencer, 3 Q. B. 693.) Where, however, a submis-

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sion to arbitration referred the amount of loss by fire on . "wool in the process of wooling, carding, scribbling, and spinning," but in other parts of the submission "raw wool" was spoken of, the arbitrator was held to be justified in refusing to take into his consideration wool in the process of manufacture, but not at the time of the fire in any of the carding machines. (In re Hurst, 1 H. & W. 275.)

On a reference of every dispute arising out of a contract, the arbitrator may decide a dispute as to the construction of the contract. (Thorburn v. Barnes, L. R., 2 C. P. 384; 36 L. J., C. P. 184.)

A claim made and abandoned before the arbitrator, What are or withdrawn, is not a matter in difference (Bird v. difference." Cooper, 4 Dow. 148; Lawrence v. Bristol and North Somerset Rail. Co., 16 L. T., N. S., Ex. 326); but a claim made by one side before the arbitrator, and admitted by the other to be correct, is a "matter in difference" and must be adjudicated upon. (In re Robson v. Railston, 1 B. & Ad. 723.)

In a submission under the L. C. C. Act, 1845, the Submission arbitrator cannot decide a question of title (Brandon Act, 1845. v. London Chatham and Dover Rail. Co., 34 L. J., Ch. 333), and he can only award in respect of interests actually claimed by notice. (In re Rhys and Dare Rail. Co., L. R., 6 Eq. 429; 37 L. J., Ch. 719.)

A reference of all matters in difference will not em- Matters inpower an arbitrator to go into a claim within the scope cluded in a former refeof a former reference in which the arbitrator directed rence not included in mutual releases, notwithstanding the matter was not "matters in specifically considered and awarded on by the former (Trimingham v. Trimingham, 4 N. & arbitrator. M. 786.) Everything which might have been gone into on a previous reference must be taken to have beer

difference."

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decided on. (Smith v. Johnson, 15 East, 213; Birks v. Trippet, 1 Saund. 28 c.)

Reference of a cause is of the cause as it stands.

Reference of a cause at nisi prius is a reference of the cause as it stands, and the arbitrator can only decide on the matters which the jury would have done. (Ashworth v. Heathcote, 6 Bing. 596; Athinson v. Jones, 1 D. & L. 225; Cooper v. Langdon, 9 M. & W. 60); and "all matters in difference between the parties," in such a case, does not include claims arising after the date of the writ (Atkinson v. Jones, supra; Pearse v. Cameron, 1 M. & S. 675), or empower the arbitrator to award on future and contingent claims (Re Brown v. Croydon Canal Co., 9 A. & E. 522; Banfil v. Leigh, 8 T. R. 571); nor will a submission of all existing differences and "anything in anywise relating thereto" extend the arbitrator's authority to matters arising after the submission, since matters relating to existing circumstances must themselves exist at the same time as the existing differences. (In re Morphett, 2 D. & L. 978, per Coleridge, J.)

Subsequent matters included by agreement, Matters arising subsequently to the commencement of the action or the date of the submission may, by agreement of the parties, be included in the reference (Re Brown v. Croydon Canal Co., supra); and in Brown v. Watson (8 Scott, 391; 8 Dow. 22), where from the peculiar terms of the submission it appeared that the parties meant to treat a growing demand as if it were a by-gone claim, the arbitrator was held justified in taking it into his consideration.

or by infe-

A power to deal with subsequent matters may sometimes arise by inference where the parties clearly meant it; thus, where an action of replevin having been brought in respect of a distress for an annuity, a reference was agreed to of "the cause and all matters in relation to

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the annuity in question," and the arbitrator awarded 50l. for arrears of the annuity due at the time of distress, and 40l. for arrears accruing between that time and the date of the order of reference, he was held not to have exceeded his authority. (Wynne v. Wynne, 3 Scott, N. R. 435.) And a railway company having taken possession of lands of the plaintiff, he brought an action of ejectment which with all matters in difference was referred to an arbitrator who was to settle the price of compensation; he was held entitled to take into consideration mesne profits down to the time of making his award. (Smalley v. Blackburn Rail. Co., 2 H. & N. 158.)

A reference of all actions between A. and B. does not comprehend actions where A. and his wife are parties (Roll. Ab. "Arb." D. 4; Barnardiston v. Fowler, 10 Mod. 205); or in which A. and another are parties on one side, and B. on the other. (Fisher v. Pimbley, 11 East, 189.) But where there is a reference of disputes between A. and B. on the one side, and C. on the other, this is taken distributively, and gives the arbitrator the power to determine differences existing between them, or either of them; and therefore an award of a matter in dispute between A. and C., or even of a matter between A. and B., would be good, such disputes being embraced by this reference. (Baspole's Case, Yelv. 203; Carter v. Carter, 1 Vern. 259; Winter v. White, 3 Moore, 674; Adcock v. Wood, 6 Ex. 814; 7 Ex. 468.)

### CHAPTER VI.

#### ALTERATION AND AMENDMENT OF THE SUBMISSION.

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Submission
may be altered
by consent.

THE terms of a submission to arbitration, like any other agreement, may be altered before the award is made, by the consent or further agreement of the parties. preserve the right of action on the original submission the alteration should be by an instrument of as high a nature as the submission, for, after the alteration, the instrument affecting the alteration becomes the submission, incorporating all the unaltered terms of the original submission. Thus, where a submission was by deed, and a new arbitrator was, by a written memorandum, substituted in the place of one of the original arbitrators, such an appointment was held to constitute a new submission, not under seal, incorporating all the remaining provisions of the former submission. (Tunno v. Bird, 5 B. & Ad. 488; Evans v. Thomson, 5 East, 189; Greig v. Talbot, 2 B. & C. 179.)

The remedy by action on the deed of submission will be lost unless the alteration is also under seal (*Brown* v. *Goodman*, 3 T. R. 592, n. (b)); and then the remedy will be by attachment or action on the award. (*Evans* v. *Thomson*, 5 East, 189.)

A recognizance to perform the award of B., is not forfeited by the non-performance of the award of C., who, by the consent of the parties, is substituted for B. by rule of court. (R. v. Bingham, 3 Y. & J. 101.)

Any alteration by consent of the parties, of the terms

of a reference by judge's order or rule of court, should CHAP. VI. be by amendment of the rule or order, drawn up according to the new agreement.

If the submission is by agreement of the parties, the courts have no power to alter the submission or to set it aside.

The courts will sometimes amend rules and orders of Courts will reference to effectuate the real intention of the parties, amend orders of reference where the orders have been erroneously or insufficiently agreement of drawn up. They cannot, however, add anything which the parties. requires the further consent of the parties; but they can correct a clerical error, as where the christian and surname of the defendant were transposed in the order (Price v. James, 2 Dow. 435); or insert such omitted matters as are incident to the substance of the agreement between the parties, as in an order at nisi prius that defendant should sell certain lands at a valuation, the words "that the defendant should make a good title and execute a conveyance of the premises" were added, such terms being implied in the original order (Evans v. Senor, 5 Taunt. 662); so where a cause was referred on the "usual terms," the court inserted a power to amend, which had been omitted in drawing up the original order. (Thompsett v. Bowyer, 9 C. B., N. S. 284; 30 L. J., C. P. 1.) And where a rule for compulsory reference was silent as to costs, and it appeared that the understanding of the officer of the court and of the parties on the drawing up of the rule was that costs would abide the event, and the arbitrator awarded in favour of the plaintiff, the court amended the rule nunc pro tunc so as to give effect to the agreement of the parties when the rule was drawn up. (Bell v. Postlethwaite, 5 E. & B. 695; 25 L. J., Q. B. 63.) On a reference of a cause two orders of nisi prius were drawn

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up for the respective attornies of plaintiff and defendants, which were not duplicates, but varied in their terms, and the defendants, after making their part of the order a rule of court, moved to set aside the award (the arbitrator having acted on the plaintiff's part of the order only), and the plaintiff made a counter motion to set aside the rule of court confirming the defendants' order as incorrect; the court directed a reference to the associate to ascertain which of the two orders was drawn up in accordance with his minutes of the agreement made at the trial, and on receiving his report set aside the rule of court confirming the defendants' order. (Alder v. Savill, 5 Taunt. 453.)

But alterations by the courts must not introduce new causes of action. But the courts have no power to amend so as to introduce a new cause of action, or to make the parties refer what they never consented to refer (Smurthwaite v. Richardson, 15 C. B., N. S. 463), and therefore can only make an alteration in an order of reference when it is manifest that there has been some omission on the part of the officer, or that, through some accident or mistake, the order is not in accordance with the intention of the parties, and does not in fact embody their agreement. (Vanderbyl v. M. Kenna, L. R., 3 C. P. 252; Houghton v. Bankart, 3 De G., F. & J. 16.)

An order of reference will not be varied upon a suggestion by one party of subsequently discovered matter. (*Drake* v. *Brown*, 2 C. M. & R. 270.)

Terms inadvertently inserted may be omitted. The court will often amend an order by striking out terms which have been inadvertently inserted; thus where a cause was referred upon the usual terms contained in a printed form of, amongst others, "filing no bill in equity," and it being found essential to the justice of the case that a bill should be filed, the condition was erased (*Grimstone* v. *Bell*, 4 Taunt. 254); and

where the words " and all matters in difference" were improvidently inserted in a compulsory reference, the court struck them out. (Kendil v. Merrett, 25 L. J., C. P. 251; but see Rawtree v. King, 5 Moore, 167.)

The court will not amend an order of reference, drawn up by one of the parties thereto, upon affidavits by such party that an error was made by him in copying a document attached by consent to the order of reference. (Wynn v. Nicholson, 18 L. J., C. P. 231; 7 C. B. 819.) And when a cause had been referred on terms signed by counsel on both sides, but the order drawn up varied from those terms, the parties appearing from their subsequent acts to have been in favour of the terms of the order, the court refused to amend it in accordance with the original terms. (Pearman v. Carter, 2 Chit. 29.) Where the arbitrator awarded a larger sum than that mentioned in the order of reference, and there appeared to be a mistake in the order as to the sum, semble, that the court would amend the order. (Hannen v. Jube, 10 Jur. 926.)

If a proposed alteration is a material one or will Material introduce new matter there must be a consent of the only by parties. (Cross v. Metcalfe, 5 A. & E. 800.) When a cause was referred at nisi prius, without any notice of set-off, it was held that a second order could not be made to enable the defendant to give a particular of set-off. (Ashworth v. Heathcote, 6 Bing. 596.) In Morgan v. Tarte (11 Ex. 82), where a cause was referred to arbitration without power of amendment, it was held that a judge has no power, except by consent of the parties, to order the particulars of demand, specially indorsed on the writ, to be altered by increasing the amount of one of the items; though in an earlier case in the Common Pleas, (Blunt v. Cooke,

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CHAP. VI. 4 M. & G. 458), after several meetings had taken place. the court allowed the plaintiff to amend his particulars by the insertion of other items in respect of services during the period covered by the former particulars.

Submission, when set aside.

If an order of reference has been improperly drawn up (Rawtree v. King, 5 Moore, 167), or obtained by fraud (Sackett v. Owen, 2 Chit. 39), application should be made to set it aside, and not to set aside the award. Where a stranger, who had agreed to join in a submission of a cause, refused to proceed with the reference, the submission was set aside on the application of one of the parties to the cause. (Bacon v. Cresswell, 1 Hodges, 189.) And where the plaintiffs had acted with bad faith towards the defendants, and had endeavoured at every step to defeat the object of the reference, a submission was set aside. (Morgan v. Miller, 6 Bing. N. C. 168.)

#### CHAPTER VII.

# DURATION OF THE ARBITRATOR'S AUTHORITY UNDER THE SUBMISSION.

SECT. 1.—Enlargement of Time by the Arbitrator or the Parties.

THERE should in every submission be a certain day named, on or before which the arbitrator is to make Duration of his award, for, if there is no limitation of time for arbitrator's making the award, there is, in the absence of any no time is statutory provision affecting the submission, no implication fixed for the tion that he shall make it within a reasonable time. (Curtis v. Potts, 3 M. & S. 145.) But, if after the parties request the arbitrator to do so, he neglects to award within a reasonable time, it would be ground for revocation of the submission. (Salter v. Yeates, 5 Dow. 291.) And now, since the C. L. P. Act, 1854, an Three months arbitrator acting under any document containing an Act. agreement that it may be made a rule of court, or under any compulsory order of reference, or any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party (8.15).

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From what time the three months begin to run.

The three months only begin to run from the time the arbitrator enters on the reference, and he enters on the reference, not when he accepts the office or takes upon himself the functions of arbitrator by giving notice of his intention to proceed, but when he begins the real business of the reference by holding a meeting of the parties, or proceeds under a peremptory appointment ex parte. (Baker v. Stephens, L. R., 2 Q. B. 523.) And the same construction applies when the matter is referred back and the arbitrator has to enter on the reference de novo. (Ib.)

When time fixed award it,

unless further time is given.

If the submission mentions a time within which the must be within award must be made, that is a condition that must be strictly complied with unless further time be given. A submission, however, usually contains a power for the arbitrator to enlarge the time for making his award. The enlargement must be made during the time previously fixed for making the award. The submission may contain an express power for the arbitrator to enlarge from time to time, or such a power may be inferred from the terms used; thus, if the submission direct the award to be made on a certain day or on or before any other day to which the arbitrator may enlarge the time, power to enlarge as often as he thinks necessary will be implied. (Payne v. Deakle, 1 Taunt. 509; Barrett v. Parry, 4 Taunt. 657.)

Enlargement by two of three arbitrators.

Where a cause was referred to two arbitrators with power to them to appoint a third, and power for any two of them to enlarge the time, and the two first named enlarged the time before appointing the third, the court held that this was an invalid enlargement as all three should have been in a position to exercise judgment on the point. (Reade v. Dutton, 2 M. & W. 69.) And the objection is not waived in such a case by the party

attending before the arbitrator, cross-examining wit- CHAP. VII. nesses and the like. (Hall v. Rouse, 4 M. & W. 24.)

If power be given to arbitrators to enlarge the time, Power of and in case of their disagreement they are to choose an umpire to enumpire who shall have power to make the award "at the time and in the manner aforesaid," this impliedly gives the umpire power to enlarge the time by his single authority. (Re Vinicome and Morgan, 10 L. J., Q. B. 128; 5 Jur. 72.) And the umpire may enlarge the time though the period for entering on his umpirage has not arrived. (Re Dodington and Bailward, 5 Bing. N. C. 591.)

If the submission provide that the death of either Enlargement party shall not be a revocation and contain the usual after death of a party. power for enlarging the time, such power may be exercised after the death of either party. (Tyler v. Jones, 3 B. & C. 144; Clarke v. Crofts, 4 Bing. 143.)

The mode of enlargement by the arbitrator depends Enlargement entirely upon the terms of the submission. Fryatt, 1 M. & S. 1; Davis v. Vass, 15 East, 97.) terms of the submission. A power to enlarge in some particular way specified in the submission must be strictly pursued. Where by an order of reference a power is given to the arbitrator to enlarge the time for making his award until such ulterior day as he shall appoint in writing under his hand to be endorsed on that order, and the court or a judge thereof shall order, it is necessary to obtain a judge's order ratifying the enlargement. (Mason v. Wallis, 10 B. & C. 107; Leggett v. Finlay, 6 Bing. 255; Davison v. Gauntlet, 1 Dow., N. S. 198.)

(Reid v. must be according to the

A general power to enlarge is sufficiently exercised Enlargement by any mode expressing the intention of the arbitrator under a general power. · that the time should be enlarged, such as verbally appointing, in the presence of the parties, a subsequent day

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for a meeting. (Burley v. Stephens, 4 Dow. 770.) And where there is such a power, any terms by which the arbitrator expresses his opinion that the time ought to be enlarged are sufficient. (Hallett v. Hallett, 7 Dow. 389.)

Enlargement by consent of the parties.

If the submission contains no power for enlarging the time, further time may be granted by consent of the And the consent of the parties, whether expressed in words or by attendance or by any other act recognising the continuance of the arbitrator's authority, waives the want of a formal enlargement and amounts in effect to a new submission. (Benwell v. Hinxman, 3 Dow. 500; Leggett v. Finlay, 6 Bing. 255; Palmer v. Metropolitan Rail. Co., 31 L. J., Q. B. 259; Tyerman v. Smith, 6 E. & B. 719; 25 L. J., Q. B. 359.) But attending under protest will not be a waiver, though the party contests the case before the arbitrator (Ringland v. Lowndes, 7 C. B., N. S. 514); nor will a waiver of previous irregularities in enlarging the time imply a consent to make future similar enlargements binding. (Mason v. Wallis, 10 B. & C. 107.)

Effect of an informal enlargement. Where there has been a waiver the award afterwards made will not be invalid on account of the want of a formal enlargement, but the court will not enforce it by attachment in any case in which it is not strictly in pursuance of the submission. (*Reade* v. *Dutton*, 2 M. & W. 69.)

Arbitrator's power to limit time depends on submission.

An arbitrator has no power to limit the time for making an award unless the submission empower him to do so; thus, where the submission limited no time for making the award, but the arbitrators, by a memorandum indorsed on the submission and signed by them but not by the parties, agreed that the award should be made within a certain time, it was held that they had no power to do this and that an award made after the time was valid. (Re Morphett, 14 L. J., Q. B. CHAP. VII. 259.)

SECT. 2.—Enlargement of Time by the Courts.

By 3 & 4 Will. 4, c. 42, s. 39, the court, or any judge Power of court thereof, may from time to time enlarge the term for to enlarge under 3 & 4 making an award by any arbitrator or umpire appointed Will. 4, c. 42. by or in pursuance of any rule of court, or judge's order, or order of nisi prius in any action, or by or in pursuance of any submission containing an agreement that such submission may be made a rule of court. (Burley v. Stephens, 4 Dow. 770.)

This enactment applies where the arbitrator has In what cases power to enlarge, but has inadvertently allowed the time to pass without exercising it. (Parberry v. Newnham, 7 M. & W. 378; Leslie v. Richardson, 6 C. B. 378.) But it is doubtful whether an enlargement can be made after one of the parties to the reference has died (Bowen v. Williams, 6 D. & L. 235), or become bankrupt. (Gaffney v. Killen, 12 Ir. C. L. R., App. 25.) The exercise of the power of enlargement is discretionary with the court. (Edwards v. Davies, 23 L. J., Q. B. 278.) The application must be by rule to show cause. (Clarke v. Stochen, 5 Dow. 32.)

Though the submission name a time beyond which Court may no enlargement may be made, the court may enlarge the submission beyond that time. Thus, where the time was limited forbid. to a day named, or such further day not exceeding two calendar months from the date of the submission as the arbitrator might appoint, it was held that the court had power to enlarge the time beyond the two months (Ward v. Secretary of State for War, 32 L. J., Q. B. 53); and so where the submission provided that the

enlarge though

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period to which the time should be enlarged should not exceed the 1st day of July, 1847. (*Parkes* v. *Smith*, 15 Q. B. 297; 19 L. J., Q. B. 405.)

And after the award is made.

It seems that if an arbitrator makes his award after the time limited for making it, and no enlargement has been made, the court may enlarge the time under this statute (Browne v. Collyer, 2 L. M. & P. 470; 20 L. J., Q. B. 426; Ward v. Secretary of State for War, supra); and the effect of the order is to render valid the award, and any steps taken from the lapse of the first period until the expiration of the time limited by the order. (Lord v. Lee, 37 L. J., Q. B. 121; L. R., 3 Q. B. 404.) Though in some instances the award has been remitted back to the arbitrator (Warner v. Powell, L. R., 3 Eq. 261), this does not seem necessary.

17 & 18 Vict. c. 125, s. 15.

By sect. 15, C. L. P. Act, 1854, "the arbitrator acting under any such document [i.e., any document authorizing a reference and containing a consent clause or compulsory order of reference as aforesaid, or under any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed, and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party, but the parties may by consent in writing, enlarge the term for making the award; and it shall be lawful for the superior court of which such submission, document, or order is or may be made a rule or order, or for any judge thereof, for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the award; and if no period be stated for the enlargement in such consent or order for enlargement, it shall be deemed to be an enlargement for one month; and in any case where an CHAP. VII. umpire shall have been appointed it shall be lawful for him to enter on the reference in lieu of the arbitrators, if the latter shall have allowed their time or their extended time to expire without making an award, or shall have delivered to any party or to the umpire a notice in writing stating that they cannot agree."

This section does not repeal the previous enactment Requisites (Re Burdon, 27 L. J., C. P. 250); and many points both acts. are applicable to both. Where the submission cannot be made a rule of court by consent neither statute applies. Under the former act an enlargement will not be made where the arbitrator having power to enlarge has intentionally let the time pass without doing so (Andrews v. Eaton, 7 Ex. 223, per Parke, B.; and see Doe v. Powell, 7 Dow. 539); nor where, by lapse of time or deaths, any difficulty would be imposed upon any of the parties, either in the conduct of the reference or in enforcing the award (Doe v. Cannell, 22 L. J., Q. B. 321; Edwards v. Davies, 23 L. J., Q. B. 278); and probably the same principles would be acted upon in any application under the latter act. Before making any application for enlargement under the former act, the submission or order must be made a rule of court (Browne v. Collyer, 2 L. M. & P. 470; 20 L. J., Q. B. 426), and, if the reference is not in an action, the better opinion seems that the same must be done under the latter act. (2 Lush's Practice, 1052.)

Section 15 applies to references by consent as well as To what cases to those under a compulsory order (Lord v. Lee, 9 B. Act applies. & S. 269; L. R., 3 Q. B. 404), and the court or a judge may at any time give such further time as he thinks fit to the arbitrator for making his award as if it

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had originally been given in the agreement or order of reference. (Ib., per Blackburn, J.)

"Consent in writing" may be waived. Though the enlargement is to be on the "consent in writing" of the parties, the fact of the consent not being in writing is merely an irregularity, and as such may be waived, and if the parties continue to attend the arbitrator after the expiration of the time without objection they will be estopped from alleging that there was no written consent. (Tyerman v. Smith, 25 L. J., Q. B. 359; 6 E. & B. 719; Bennett v. Watson, 5 H. & N. 831; 29 L. J., Ex. 357.) Omission to state in the order for enlargement any cause for the order is also a mere irregularity, and will not affect the order. (Re Burdon, 27 L. J., C. P. 250.)

Jurisdiction of courts of equity.

A court of equity has power to enlarge time under both the above enactments. (*Warner* v. *Powell*, L. R., 3 Eq. 261.)

#### CHAPTER VIII.

#### REVOCATION.

REVOCATIONS are either by express act of the parties, CHAP. VIII. or by operation of law, as by death, marriage of a feme sole or the like.

There is a common law right in either party to a Common law submission to countermand it at any time before the revoke. award is made (Vynior's Case, 8 Rep. 81b); and prior to 3 & 4 Will. 4, c. 42, either party after entering into a submission, notwithstanding it contained a consent that it might be made a rule of court, or was expressed to be irrevocable, might revoke his submission at any time before the making of the award, and before the submission was actually made a rule of court; and this though the submission was of a cause at nisi prius. (R. v. Burridge, 1 Str. 593; Lowes v. Kermode, 2 Moore, 30.) And if the arbitrator had afterwards proceeded and made his award notwithstanding the revocation, the party against whom it was made would not have been liable to an attachment for non-performance of it (Milne v. Gratrix, 7 East, 608), and the court, on application, would have set it aside. (Clapham v. Higham, 7 Moore, 403.) After the submission (whether it were by judge's order, order of nisi prius, or agreement containing a consent clause) was made a rule of court, either party revoking the submission would be guilty of, and liable to an attachment for, a contempt. (Milne v. Gratrix; Clapham v. Higham,

CHAP. VIII. supra.) And where the judge's order contained not only the submission of the parties, but directed that either party should under certain circumstances pay to the other "such costs as the court should think reasonable and just," it was held that such an order might be made a rule of court after a revocation, in order to enable the court to dispose of the question of costs. (Aston v. George, 2 B. & A. 395.)

Power of revocation restricted by 8 & 4 Will. 4, c. 42.

The common law power of revocation is now, however, very much restrained by statute. 3 & 4 Will. 4, c. 42, s. 39, enacts, "that the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of court or judge's order, or order of nisi prius, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's courts of record, shall not be revocable by any party to such reference without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference notwithstanding any such revocation, and to make such award. although the person making such revocation shall not afterwards attend the reference."

Requisites to the act.

Under this act, to take away the right of revocation bring a sub-mission within requires one of two things, either (1) the parties must have consented to a rule of court, judge's order or order of nisi prius in an action, or (2) the submission must contain an express agreement to make it a rule of one of her Majesty's courts of record. A court of equity is a court of record within the meaning of the act. (Warner v. Powell, L. R., 3 Eq. 261.)

Although all submissions in writing may now be CHAP. VIII. made rules of court, unless they contain a stipulation to Submissions the contrary, they are not within the act unless they con- court under tain an express consent to make them rules of court, 8. 17, C. L. P. Act, 1854, but may be revoked, where no action has been brought, revocable. notwithstanding they may have been made rules of court under sect. 17, C. L. P. Act, 1854. (In re Rouse and Meier, L. R., 6 C. P. 212; Mills v. Bayley, 32 L. J., Ex. 179; In re Drury, 38 L. J., Ch. 278; Thomson v. Anderson, L. R., 9 Eq. 523; 39 L. J., Ch. 468.) But it has been held that there is no power of revocation where the adjudication of the arbitrator is a mere appraisement. So that where by a deed between P., the plaintiffs, and the defendant, P. covenanted with the plaintiffs that he would commence and forthwith build and finish a gas-holder tank, and that the work should be completed on a day mentioned, or, in default, P. should forfeit to the plaintiff 50l. and 20s. for every day the completion should be delayed beyond that time; and the defendant, as P.'s surety, covenanted with the plaintiff that P. should perform the covenants on his part, and in default that the defendant would pay to the plaintiff such sum as E. should adjudge proper; in an action for not finishing the work, and for not paying the amount which E. had adjudged proper, it was held that E.'s power could not be revoked by any of the parties to the deed. (Northampton Gas Light Co. v. Parnell, 15 C. B. 630; 24 L. J., C. P. **60.**)

The act does not affect revocations by operation of Other matters It does not apply when the submission is incom- not within the statute. plete; so that where arbitrators are appointed in pursuance of a clause in a deed that all disputes shall be referred to the arbitration of two persons named, who

CHAP. VIII. are directed to choose an umpire before they proceed, but the umpire has not been appointed, it is not within the statute. (Bright v. Durnell, 4 Dow. 756.) It is limited to references of civil proceedings, and when criminal matters are referred the submission is revocable as at common law. (R. v. Bardell, 5 A. & E. 619; R. v. Shillibeer, 5 Dow. 238; R. v. Hardey, 14 Q. B. **529.**)

Applications for leave to revoke.

An application to the court, under the statute, for leave to revoke, must be by rule or summons to show cause, and will not be granted ex parte (Clarke v. Stocken, 2 Bing. N. C. 651; 3 Scott, 94), and must be made before the award has been executed. (Phipps v. Ingram, 3 Dow. 669.) The power will be exercised with great caution, and only when good grounds are shown. (James v. Attwood, 7 Scott, 841; Re Woodcroft and Jones, 9 Dow. 538.) The bankruptcy of one party would probably be ground for a revocation (Gaffney v. Killen, 12 Ir. C. L. Rep. (N. S.) App. 25; Marsh v. Wood, 9 B. & C. 659); so would corruption in an arbitrator (Drew v. Leburn, 2 Macq. 1), or his receiving evidence behind the back of the one party (Drew v. Drew, 25 L. T. 282), or two arbitrators appointing an umpire by lot (European and American Steam Shipping Co. v. Croskey, 29 L. J., C. P. 155), or if it be shown that the arbitrator is about to exceed his authority. (Faviell v. Eastern Counties Rail. Co., 2 Exch. 350; Hart v. Duke, 32 L. J., Q. B. 55.) But it has been held that the admission of evidence by the arbitrator where such evidence is doubtful (Scott v. Van Sandau, 1 Q. B. 102), or his refusal to exercise a power to state the grounds on which his decision is founded (Clarke v. Stocken, 3 Scott, 94; 2 Bing. N. C. 651), are not grounds for revocation; but it seems the wrongful reception of proper evidence is, unless the arbitrator will CHAP. VIII. consent to obey the directions of the court in receiving such rejected evidence. (Hart v. Duke, 32 L. J., Q. B. 55.) An applicant cannot set up his own acts as grounds for revocation. (Re Woodcroft and Jones, 9 Dow. 538.) Nor will revocation be allowed because some necessary third party will not concur in the reference, unless at any rate the submission was conditional upon his concurrence. And where an action and a chancery suit were, with the consent of the parties to the action, referred at nisi prius, one of the parties to the chancery suit was not a party to the action, and nothing was said when the suit was referred as to obtaining his consent, his refusal to concur was held no ground for revocation. (Wilson v. Morrell, 15 C. B. 720; 3 C. L. Rep. 333.)

Where the arbitrator's authority may still be revoked Revocation by by the parties, the revocation must be by an instrument mode of. of as high a nature as the submission; therefore if the submission is by deed, the revocation must be by deed also (Braddick v. Thompson, 8 East, 344; Vynior's Case, 8 Rep. 81, n.; R. v. Wait, 1 Bing. 121); but a parol revocation will be sufficient where the submission is not by deed. It seems to be the better opinion that a revocation by one of several parties on the same side is a revocation by all, but the point has been the subject of contrary decisions.

To make a revocation complete, unless it is by ope- Notice of, ration of law, notice must be given to the arbitrator. must be given to arbitrator. (Marsh v. Bulteel, 5 B. & A. 507; Vynior's Case, 8 Rep. 81, n.)

Unless expressly provided to the contrary, the death Death of a of either party,—where there are only two—to a sub-party a revomission, before the award is made, acts as a revocation

CHAP. VIII. of the authority (Cooper v. Johnson, 2 B. & A. 394; Tyler v. Jones, 3 B. & C. 144; Blundell v. Brettargh, 17 Ves. 232); and it is the same where a cause is referred by rule of court or order of nisi prius (Rhodes v. Haigh, 3 D. & R. 60; Potts v. Ward, 1 Marsh, 366);where, however, the arbitrator has merely to state a special case, the death of one of the parties will not affect his authority. (James v. Crane, 15 M. & W. 379.) Even after a verdict is taken, subject to an award, the death of either party after verdict and before the award is made is a revocation. (Toussant v. Hartop, 7 Taunt. 571.) Where the arbitrators were to make and publish their award in writing, ready to be delivered to the parties in difference before a certain day, it was held that the execution of the award in the lifetime of the plaintiff was sufficient to make it valid though the plaintiff died before notice to either party to the reference. (Brooke v. Mitchell, 6 M. & W. 473.)

> Where the arbitrator is in the position of a person appointed by vendor and purchaser to fix the value and price of an estate sold, the death of either party does not operate as a revocation of the submission. (Caledonian Rail. Co. v. Lockhart, 3 Macq. 808.)

Whether death of one of several parties a revocation.

It seems very questionable, whether an award after the death of one of several parties on one side of a reference is void (Re Hare, 8 Scott, 367; 8 Dow. 71, per Tindal, C. J.); and it will not be so if the submission provide that it may be delivered to the parties or their personal representatives. (1b.; Harding v. Wickham, 9 W. R. 652; 4 L. T., N. S. 738.) Without such a provision it seems the death of one of several parties on the same side to a joint and several submission, is not a revocation as to the others. (Vynior's Case, 8 Rep.

Therefore where differences arose between the CHAP. VIII. owners of a ship and the freighters (the latter having distinct interests in the cargo), and it was agreed between them, that the matters in difference should be referred; it was held that the death of one of the freighters, before award made, only affected the award as to him and was no revocation as to the others. (Per Three Justices, cited 2 Chit. Arch. 1648, 12th ed.) And where the interest is joint and the cause of action survives, an award, made after the death of one and against the survivors, might perhaps be good (Edmunds v. Cox, 2 Chit. 435); but it would be bad if made not only against the survivors, but also directing the executors of the deceased to give a release. (Ib.; and see Bristow v. Binns, 3 D. & R. 184.)

It is practical and usual to insert a clause in a sub- Clause premission to provide that the death of either party shall being a revonot revoke the arbitrator's authority, but that the award in case of death shall be delivered to their personal representatives (Cooper v. Johnson, 2 B. & A. 394; Clarke v. Crofts, 4 Bing. 143; 12 Moore, 349); and in such a case, the award will bind the personal representatives (Dowse v. Coxe, 10 Moore, 273; 3 Bing. 20; In re Hare, supra; M. Dougal v. Robertson, 4 Bing. 435) to the extent of the assets of the deceased in their possession. (Lewin v. Holbrook, 2 Dow., N. S. 991; Prior v. Hembrow, 8 M. & W. 873.) And when the submission provides that the death of either of the parties shall not operate as a revocation, the death of one party before the other has an opportunity to examine him as a witness, does not affect the provision. (Smith v. Fielder, 10 Bing. 306; 3 M. & S. 853.)

The marriage of a female party to an arbitration Marriage of

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female party
a revocation.

before award, works a revocation of the submission (Charnley v. Winstanley, 5 East, 266; M'Cave v. O'Ferroll, 8 C. & F. 30; Saccum v. Norton, 2 Keb. 865), unless a provision to the contrary is inserted in the submission. And it is said that the intermarriage of one of several parties, who have agreed to refer, is a revocation as to the others. (Roll. Ab. "Authority," (E.) 4.)

Bankruptcy not a revocation. Though formerly doubted (Marsh v. Wood, 9 B. & C. 659), it seems now established that the bankruptcy of either party to a reference will not of itself operate as a revocation of the submission (Taylor v. Shuttleworth, 8 Dow. 281; Taylor v. Marling, 2 M. & G. 55; Hemsworth v. Brian, 1 C. B. 131); and this whether the submission is by order of nisi prius or not. (Andrews v. Palmer, 4 B. & A. 250; Snook v. Hellyer, 2 Chit. 43.) The trustees of a bankrupt cannot however be compelled to become parties to the reference, nor is the submission binding upon them unless they choose to adopt it. (Pennell v. Walker, 26 L. J., C. P. 9; Sturgess v. Curzon, 7 Ex. 17.)

The bankruptcy of the one party will however justify the other party to the submission in revoking without being liable to an action (*Marsh* v. *Wood*, 9 B. & C. 659); and we have seen that it would be good ground for an application to the court to revoke (*ante*, p. 60).

Revoking party liable to an action. Though a party may be able to revoke the authority of the arbitrator, he cannot revoke the instrument of submission, but will be liable to an action on such instrument. The remedy for revocation of a submission when not under seal is by action for breach of agreement (*Brown* v. *Tanner*, M<sup>c</sup>Cl. & Y. 464; *Warburton* v. *Storer*, 6 D. & R. 213); when the submission is by deed the revoking party is liable to an action on the

covenant. (Milne v. Gratrix, 7 East, 607; King v. CHAP. VIII. Joseph, 5 Taunt. 452.) Revocation by marriage renders the woman and her husband liable to an action. (Charnley v. Winstanley, 5 East, 266.)

On a reference under the L. C. C. Act, 1845, after No power to the appointment by each party of an arbitrator, neither the L. C. C. shall have power to revoke such appointment without Act, 1845, &c. the consent of the other, nor shall the death of either party operate as a revocation. (8 & 9 Vict. c. 18, s. 25.) Similar provisions are made for references under the Railways Clauses Act, 1845 (s. 126); the Companies Clauses Act, 1845 (s. 128); and the Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59, s. 11).

Where a submission is not made a rule of court the Costs of an costs of the abortive reference in case of revocation can reference. only be recovered, if at all, by action on the submission (Doe v. Morgan, 4 M. & W. 171); but where the submission is made a rule of court, the court, in allowing the revocation, can of course impose such terms as to costs as it may see fit. (Morgan v. Miller, 8 Scott, 266.)

#### CHAPTER IX.

#### THE ARBITRATORS AND UMPIRE.

## SECT. 1 .- The Arbitrators.

Who may be an arbitrator.

UNLESS the reference is under some statute which points out the class of persons from which the arbitrator is to be selected, any person may be appointed arbitrator; and if the parties agree to choose the arbitrator by lot, they may do so. (Re Shaw and Sims, 17 L. T. 160.) Some of the older authorities except, as incompetent to be arbitrators, infants and lunatics, but it is not now probable that disability of any kind in the person chosen, known at the time of appointment, would be ground for impeaching the award, for the parties choose their own tribunal and agree to abide by its decision. (Ashton v. Pointer, 3 Dow. 201; Huntig v. Ralling, 8 Dow. 879.) Persons unimpeachable on the score of interest or capacity are usually, and should always be, chosen.

Notification to the person chosen, and acceptance by him of the office, are necessary to complete the appointment of an arbitrator. (*Ringland v. Lowndes*, 15 C. B., N. S. 173; 33 L. J., C. P. 25.)

Persons interested.

It is no ground for setting aside an award that the arbitrator is a party to the submission, if the other party assented to his appointment; or that he is interested in the matter submitted, provided that, at the time of submission, the objecting party was aware of

his interest. (Matthew v. Ollerton, 4 Mod. 226; Har- Chap. IX. court v. Ramsbottom, 1 J. & W. 511; Johnston v. Cheape, 5 Dow. 247.) But if the interest is a secret one (Woolly v. Clarke, 2 D. & R. 158), or the arbitrator has any bad feeling towards one of the parties (Parker v. Burroughs, Colles, Parl. Ca. 257; Earle v. Stocker, 2 Vern. 251), or, from the existence of circumstances unknown to both parties, he is likely to be biased (Kemp v. Rose, 1 Giff. 258), the award will be But mere indebtedness to one of the parties will not disqualify a person for being an arbitrator (Morgan v. Morgan, 1 Dow. 611); and where an arbitrator to whom certain disputed debts between A. and B. had been referred, was one of several trustees who had lent part of the trust moneys to A., unknown to B., who, on discovering the fact and that A. was insolvent, applied to rescind the submission, it was held that the interest was too remote to warrant the court in rescinding. (Drew v. Drew, 25 L. T. 282.)

If a party is aware of any objection to the arbitrator Objection and yet proceeds with the reference, he will be held to waived by (Elliot v. South Devon Rail. Co., the reference. waive the objection. 2 De G. & S. 17.) In such a case he ought to refuse to proceed, and retire from the reference.

The decision of horse stewards (who by the rules of the course are made arbiters of all disputes as to the results of a horse race) is not invalid by reason of one of them having made a bet against one of the horses concerned in the dispute. (Ellis v. Hopper, 28 L. J., Ex. 1; 3 H. & N. 766.)

It cannot be too strongly impressed upon arbitrators Requisites of that the first great requisite in persons occupying that post is a judicial impartiality and freedom from bias. They should regard themselves as judges (Harvey v.

Shelton, 7 Beav. 455; Morris v. Reynolds, 2 Ld. Raym. 857), and bound by the same rigid necessity as the judges of her Majesty's courts, not only of not being actuated by corrupt and fraudulent motives or partiality, but even of so deporting themselves in every way as to be above the suspicion of being so actuated. "In a matter of so tender a nature," says Lord Hardwicke, "even the appearance of evil is to be avoided."

Misconduct voids the award.

If the arbitrator acts corruptly, or with partiality, or colludes with one of the parties, the award will be bad (9 & 10 Will. 3, c. 15; Stewart v. Williamson, 5 Bing. 415; Morgan v. Mather, 2 Ves. 15; Clarke v. Stocken, 2 Bing. N. C. 651; Hutchins v. Hutchins, And. 297; Tittenson v. Peat, 3 Atk. 529); so if he has used strong expressions against either party (Burton v. Knight, 2 Vern. 515; Ward's Case, 2 Atk. 396; Chicot v. Lequesne, 2 Ves. sen. 315), or has taken money from one of the parties alone, for his charges, before making the award (Shephard v. Brand, 2 Barnard. 463), or purchased the unascertained claims of any of the parties. (Blennerhasset v. Day, 2 Ball & Beatty, 104.)

Accepting hospitality.

It is improper in an arbitrator to accept hospitality from one of the parties, and if the invitation be given with the intent, or have the effect of inducing the arbitrator to act unfairly, the court will set aside the award. (In re Hopper, 36 L. J., Q. B. 97; L. R., 2 Q. B. 367.) But merely dining at an inn with one of the parties and his witnesses was, in one case, held not to invalidate an award (Crossley v. Clay, 5 C. B. 581); and it is said the court will not interfere on the ground of misconduct of the arbitrator on mere suspicion. (Ib.)

Same obligations on joint as on sole arbitrators. Where, as is commonly the case, each of the two parties to a reference appoints an arbitrator, there is a

danger of the persons so appointed considering themselves as the agents or tools of their respective appointors, and acting accordingly. This is a highly censurable and dangerous mistake, as it must always imperil the award. Each arbitrator has the same obligations upon him, when more than one are appointed, as if he were the sole arbitrator, and any fraud, corruption, partiality, or bias that would invalidate an award if the arbitrator were acting alone, will have the same effect when he awards jointly with another, or others, even though the conduct of the others is unimpeachable. (Burton v. Knight, 2 Vern. 515; Fetherstone v. Cooper, 9 Ves. 67; Watson v. Duke of Northumberland, 11 Ves. 153.) Joint arbitrators have no right to act as the advocates of their respective appointors. (In re Templeman and Reed, 9 Dow. 962.) In Oswald v. Grey (24 L. J., Q. B. 69), Erle, J., observed: "It appears in the present case that each of the arbitrators has considered himself the agent of the party who nominated him. This is a notion which ought strongly to be repudiated, and that it is wrong for an arbitrator so nominated to consider himself appointed to take care of the interests of one party only, and not of the other as well."

Where differences are referred to two arbitrators, one Appointment to be appointed by each party, the appointment on each municated to side will not be complete until notified to the other side. the other side. (Tew v. Harris, 11 Q. B. 7; Thomas v. Fredericks, 10 Q. B. 775.)

On a reference to several arbitrators with no provision Joint arbitrathat less than all may make an award, each must act tors must act together. (Little v. Newton, 2 M. & G. 351; Stalworthy v. Inns, 2 D. & L. 428), and all must act together (Morgan v. Bolt, 1 N. R. 271), and every stage of the proceedings

must be in the presence of all (*Plews v. Middleton*, 6 Q. B. 845; *Peterson v. Ayre*, 23 L. J., C. P. 129), and the award must be signed by all at the same time. (*Wade v. Dowling*, 4 E. & B. 44; *Eads v. Williams*, 24 L. J., Ch. 531.)

When the majority may

Where the reference is to three arbitrators, enabling them or any two of them to hear the case and make the award, although two have jurisdiction over the case, they must, that their award may be valid, have given the third notice of the meetings that he might have attended had he chosen. (Goodman v. Sayers, 2 J. & W. 261; Dalling v. Matchett, Barnes, 57.) Where there is no positive refusal, two cannot act without first taking the opinion of the third. If, after discussion, he refuses to concur with them in the award, they may execute it, and it will be good. (White v. Sharp, 12 M. & W. 712; Sallows v. Girling, Cro. Jac. 277; Re Perring and Keymer, 3 A. & E. 245; Re Templeman and Reed, 9 Dow. 962.)

Parties may appoint a new arbitrator.

The parties may by consent substitute an arbitrator in the place of the one originally appointed; but this will amount to a new submission. (*Tunno* v. *Bird*, 5 B. & Ad. 488.)

How a vacancy may be filled on the death, incapacity, &c. of an arbitrator. The C. L. P. Act, 1854, makes the following provisions:—If in any case of arbitration the document authorizing the reference provide that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator; or if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one; a judge of any of the superior courts of law or equity may

upon summons, appoint an arbitrator, who shall have CHAP. IX. the like powers to act in the reference and make an award as if he had been appointed by consent of all parties (s. 12). And when the reference is or is in-Reference to tended to be to two arbitrators, one appointed by each tors, and one party, it shall be lawful for either party, in the case of party fails to appoint, other the death, refusal to act, or incapacity of any arbitrator party may appointed by him, to substitute a new arbitrator, unless trator to act the document authorizing the reference show that it was intended that the vacancy should not be supplied; and if on such a reference one party fail to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party shall have appointed an arbitrator, and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference, and an award made by him shall be binding on both parties as if the appointment had been by consent; provided, however, that the court or a judge may revoke such appointment on such terms as shall seem just (s. 13).

appoint arbi-

The L. C. C. Act, 1845, makes provision for the Vacancy under remaining arbitrator proceeding in the reference alone the L. C. C. Act, 1845. when the other arbitrator dies or becomes incapable, and the party whose nominee he was neglects to make another appointment (s. 26); and the same where the arbitrator refuses or for seven days neglects to act (s. 30). Corresponding provisions are contained in the Railways Clauses Act, 1845, and the Railway Companies Arbitration Act, 1859. In a reference under the two former acts the death of a single arbitrator before he has made his award determines the proceedings and the arbitration must begin de novo.

CHAP. IX.

Arbitrator
may not delegate his
authority.

Arbitrators must themselves decide the matters submitted to them, and may not delegate their judicial powers, even to each other (Lingood v. Eade, 2 Atk. 505; Little v. Newton, 9 Dow. 437), but they may adopt the opinions and views of each other. (Eardley v. Steer, 4 Dow. 423.) They may not agree beforehand to be bound by the opinion of a third person without exercising their own judgment on the point. (Whitmore v. Smith, 8 Jur., N. S. 514; 31 L. J., Ex. 107.) Where an arbitrator made his award "subject to the opinion" of another person, it was held that this was a substituted judgment and therefore bad. (Ellison v. Bray, 9 L. T., N. S. 730.) An arbitrator may, however, adopt the opinion taken from another person as his own. (Emery v. Wase, 5 Ves. 846; 8 Ves. 504.)

Where, pending a reference, the parties, by a memorandum to which the arbitrator was an assenting party, agreed that a particular portion of the account in dispute should be settled and adjusted by a third person, whose report was to be adopted by the arbitrator as conclusive evidence, it was held that this was not an improper delegation of authority by the arbitrator. (Sharp v. Nawell, 6 C. B. 253.)

# SECT. 2.— The Umpire.

When an umpire may be appointed.

Where two arbitrators are appointed and nothing to the contrary appears in the instrument of reference, an umpire may be chosen. It is usual to make provision for his appointment in the submission, and in such case the nomination may either be by the parties themselves at the time of submission (which is the preferable mode),

or may be left to the arbitrators. In the latter case the appointment is often made a condition precedent to the arbitrators entering on the reference (Bright v. Durnell, 4 Dow. 756; In re Hick, 8 Taunt. 694), in which event no valid step can be taken in the arbitration until it is But merely enlarging the time before appointing an umpire is not an entering on the reference so as to render the appointment null. (Cudliffe v. Walters, 2 M. & R. 232; but see Reade v. Dutton, 2 M. & W. 69.)

The following provisions for the appointment of an umpire are made in the C. L. P. Act, 1854:-When When the the reference is to two arbitrators, and the terms of the may appoint document authorizing it do not show that it was in- an umpire. tended that there should not be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award, unless they be called upon by notice to make the appoint-And when the parties or two When the ment sooner (s. 14). arbitrators are at liberty to appoint an umpire or third appoint, arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator; or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorizing the reference do not show that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one; then a judge, upon application, will appoint an umpire (s. 12).

In a reference to two or more arbitrators under the Appointment L. C. C. Act, 1845, the arbitrators must, before enter-under the ing upon the reference, appoint by writing an umpire to L. C. C. Act, decide matters on which they shall differ, or which may

be referred to him under the provisions of the acts; and if he die, they should forthwith appoint another (s. 27). If the arbitrators refuse or for seven days after request neglect to appoint an umpire, the Board of Trade, where a railway company is a party to the arbitration and two justices in any other case, are to appoint an umpire, and the decision of such umpire on the matters in which the arbitrators differ or which are referred to him under the acts is final (s. 28). The Railways Clauses Act, 1845, and the Railway Companies Arbitration Act, 1859, contain corresponding provisions. The latter, however, makes provision in case the umpire neglect or refuse to act (22 & 23 Vict. c. 59, ss. 14—16), which the two former do not.

Appointment must be by both arbitrators at the same time. The appointment of an umpire must be signed by both arbitrators at the same time or in each other's presence, or the appointment will be invalid (*Lord* v. *Lord*, 26 L. J., Q. B. 34; 5 E. & B. 404); unless they have previously decided upon the umpire and the signing is a mere record of their decision. (*In re Hopper*, 36 L. J., Q. B. 97; L. R., 2 Q. B. 367.)

At what time the umpire may be appointed. Where the umpire is to be appointed by the arbitrators, he may, in general, be appointed by them before they enter upon the reference, even although the submission give power to appoint only in case of their disagreeing (Bates v. Cook, 9 B. & C. 407; Winteringham v. Robertson, 27 L. J., Ex. 301); and when no time is prescribed, they may in fact appoint the umpire at any time before or after the time limited for making their award so as the appointment is within the time allowed for making the umpirage. (2 Saund. 133b; Harding v. Watts, 15 East, 556; Re Doddington, 8 L. J., C. P. 331; Re Johnson and Collie, 24 L. J., Q. B. 63.)

Appointment

The appointment must be a matter of choice and not

of chance (In re Cassell, 9 B. & C. 624; Ford v. Jones, 3 B. & Ad. 248; Young v. Miller, 3 B. & C. 407); so must not be that where arbitrators, being unable to agree upon a proper person to appoint, agreed to cast lots which should have the nomination, the appointment was held bad. (Wells v. Cook, 2 B. & A. 218; Harris v. Mitchell, 2 Vern. 485.) The assent of the parties, given with a full knowledge of all the attendant circumstances to such an appointment, may make it valid. (Hodson v. Drewry, 7 Dow. 569; Tunno v. Bird, 5 B. & Ad. 488.) But neither attending meetings before an umpire so chosen (Wells v. Cooke, 2 B. & A. 218), nor assenting to the umpire chosen, without knowing the mode of choice (Re Greenwood, 9 A. & E. 699), nor even knowing the mode of choice, but not knowing the person chosen had before casting lots been objected to by one of the arbitrators (Re Jamieson, 4 A. & E. 945). will prevent one of the parties from taking the objection to the appointment. An attorney or agent (Backhouse v. Taylor, 20 L. J., Q. B. 233)—but not the attorney's clerk (Hodson v. Drewry, 7 Dow. 569)—has power to consent to an appointment by lot.

Where each arbitrator named an umpire whom the other thought a proper person, and not being able to decide which of the two proposed should be selected, they agreed to decide the choice by lot, the appointment was held good, for as each arbitrator admitted the fitness of the person proposed by the other, the one chosen was in fact the nominee of both. (Neale v. Ledger, 16 East, 51; Ford v. Jones, 3 B. & Ad. 248; European and American Steam Shipping Co. v. Croskey, 29 L. J., C. P. 155; In re Hopper, 36 L. J., Q. B. 97.)

Appointment of another if first refuse to act.

Unless the person named as umpire accept the appointment, the arbitrators may appoint another person. (Trippet v. Eyre, 3 Lev. 263; Reynolds v. Gray, 1 Salk. 70; 2 Saund. 133 a.) But a regular appointment of an umpire who accepts the appointment, cannot be revoked or affected by the subsequent dissent of the parties. (Oliver v. Collings, 11 East, 367.)

Mode of appointment.

If the submission indicates the mode of appointing an umpire, or the reference is under a statute, the directions of the submission, or the provisions of the statute must be followed; when no mode of appointment is prescribed it may be by parol. (Oliver v. Collings, 11 East, 367.)

Stamp not necessary.

The appointment of an umpire need not be stamped (Routledge v. Thornton, 4 Taunt. 704), unless it be by deed.

Commencement of umpire's powers.

In any case where an umpire shall have been appointed it shall be lawful for him to enter on the reference in lieu of the arbitrators, if the latter shall have allowed their time or extended time to expire without making an award, or shall have delivered to any party or to the umpire a notice in writing stating that they cannot agree. (C. L. P. Act, 1854, s. 15.) Independently of this enactment the authority and powers of an umpire only arise when the arbitrators have disagreed, or where they have allowed the time for their award to pass without agreeing, or neglecting to agree. make his umpirage at any time before the expiration of the time limited for that purpose by the submission; he may do so even before the expiration of the time limited for the arbitrators making their award. (Sprigens v. Nash, 5 M. & S. 193; Smailes v. Wright, 3 M. & S. 559.)

If one arbitrator requires more evidence to be laid CHAP. IX. before him and the other does not, this is a sufficient What is a disdisagreement to warrant the appointment or interference agreement of the arbitrators. of the umpire, when it has been agreed that such shall take place upon the arbitrators disagreeing. (Cudliffe v. Walters, 2 M. & R. 232; Winteringham v. Robertson, 27 L. J., Ex. 301.)

The duty of the umpire when he acts is to decide Umpire must upon the whole of the matters in difference between the the parties parties, and not upon particular points upon which the and not between the arbitrators are unable to decide (Tollit v. Saunders, 9 arbitrators. Price, 612; Brachen v. Green, 4 Ir. Jur. 23), unless there is an express provision for that purpose in the submission (Hetherington v. Robinson, 7 Dow. 192; Lang v. Brown, Russell on Arb. 212), or in the statute providing for the reference, as in the L. C. C. Act, 1845.

decide between

When acting, the umpire has the same powers and Powers and rights, and is bound by the same rules as the arbitrators. umpire, (Bean v. Newbury, 1 Lev. 139; Salkeld v. Slater, 12 A. & E. 767; In re Jenkins, 1 Dow., N. S. 276; Waltonshaw v. Marshall, 1 H. & W. 209; Matson v. Trower, R. & M. 17.) If he sit with the arbitrators to hear evidence, he should take no part in their discussions or impede their coming to an agreement. (Flag Lane Chapel v. Mayor of Sunderland, 5 Jur., N. S. 894.) When he does not sit with the arbitrators he should re-examine the witnesses, but it has been held competent for the umpire to receive the evidence from the arbitrators when the parties expressly consent to his doing so (Re Firth and Howlett, 19 L. J., Q. B. 169), or knowing that he is about to do so, make no objection (Hall v. Lawrence, 4 T. R. 589; Tunno v. Bird, 5 B. & Ad. 488), or otherwise waive the right.

If either of the parties request him to examine the witnesses, and he refuses, the court will set aside his umpirage. (Salkeld v. Slater, 12 A. & E. 767.) So if he refuse to receive further evidence besides that which was given before the arbitrators, his umpirage will be bad and the court will set it aside, and the fact of one of the parties having taken it up will be no waiver of the objection. (In re Jenkins, 1 Dow., N. S. 276; 11 L. J., Q. B. 71.)

Arbitrators joining in the umpirage mere surplusage. If the arbitrators join the umpire in his umpirage, it is mere surplusage and will not vitiate the instrument. (Bates v. Cook, 9 B. & C. 407; Beck v. Sargent, 4 Taunt. 232; Soulsby v. Hodgson, 1 W. Bl. 463.)

Before an arbitrator or umpire shall enter into the consideration of any matters referred to him under the L. C. C. Act, 1845, or the Railways Clauses Act, 1845, he must, in the presence of a justice of the peace, make a declaration in the form given in those acts (8 & 9 Vict. c. 18, s. 33; 8 & 9 Vict. c. 20, s. 134); and such declaration shall be annexed to the award when made.

### Sect. 3.—Remuneration of Arbitrators—Their Liability for Misconduct.

An arbitrator is at liberty to fix his own charges, and it is usual for him to do so. (*Threlfall v. Fanshaw*, 19 L. J., Q. B. 334.) But he should not state the amount in his award unless authorized to do so by the submission.

Arbitrator cannot sue for his fees.

In the absence of an express promise by the parties to the reference to pay the arbitrator he cannot recover his charges by action. (*Veitch* v. *Russell*, 3 Q. B. 928.) He has, however, a lien upon the award and

submission (but not upon documents put in evidence CHAP. IX. before him), and may retain them until his charges have been paid. The usual practice, therefore, is for the arbitrator to notify to the parties the amount of his charges, and to refuse to deliver the award or communicate its contents until they are paid. This obviates all disputes. And he is justified in so doing, even where the reference is under the L. C. C. Act, 1845. (R. v. South Devon Rail. Co., 15 Q. B. 1043.) payable to legal arbitrators are well known in the profession, and are sanctioned by the masters on taxation.

If each party be ordered to pay a moiety of the arbitrator's charges, one of them may pay the entire sum in order to get the award from the arbitrator, and may afterwards have the same remedy against the other, if he refuse to pay his moiety, as he would have for the non-performance of any other part of the award. (Hicks v. Richardson, 1 B. & P. 93; Marsack v. Webber, 6 H. & N. 1.)

Though an arbitrator may fix his own charges, he is Excessive not at liberty to fix an exorbitant sum. If he does so, arbitrator and a party in order to take up the award is obliged to recoverable by action. pay or pays involuntarily such unreasonable amount, he may recover the overcharge by action for money had and received, for the money being extorted under a species of duress of property contrary to the law, an action lies to recover the excess. (Fernley v. Branson, 20 L. J., Q. B. 178; In re Coombs, 4 Exch. 839; Barnes v. Braithwaite, 2 H. & N. 569.) But the courts have no summary jurisdiction over an arbitrator to compel him by attachment to refund the amount received by him beyond what is allowed on taxation. (Dossett v. Gingell, 2 M. & G. 870.) If one of the parties has paid an excessive claim for the arbitrator's

charges on taking up the award, and he is entitled to the costs of the award, he is not entitled to recover from the opposite party more than a reasonable sum for the arbitrator's fee, and the master on taxation between party and party may tax off the excess. In such a case the party must resort to his remedy by action against the arbitrator to recover the difference between the amount paid and the amount allowed on taxation. (Barnes v. Hayward, 1 H. & N. 742.)

It has not been expressly decided what are the rights of a party to recover from the arbitrator charges paid in order to take up an award which is afterwards set aside for a gross mistake of the arbitrator. (But see Hall v. Hinds, 2 M. & G. 847.)

Costs of umpirage.

When an award is made by an umpire on the disagreement of the arbitrators, or on their failing to award, he is entitled to charge the fees due to the arbitrators as part of the costs of the umpirage. (Ellison v. Ackroyd, 20 L. J., Q. B. 193.) If the umpire fail to charge them, the party who has paid the arbitrator's fees will be entitled to have the amount allowed him among the other costs of the reference. (Whitmore v. Friend, Russell on Arb. 353.)

Action against arbitrator for misconduct. It has been said that an arbitrator is liable to an action if he misconduct himself (Wills v. Maccarmick, 2 Wils. 148; and see Moore v. Foster, Yelv. 62); but there does not seem to have been any case in which such an action was ever brought.

Wilful misconduct in an arbitrator appointed under the L. C. C. Act, 1845, or the Railways Clauses Act, 1845, is a misdemeanor. (8 & 9 Vict. c. 18, s. 33; 8 & 9 Vict. c. 20, s. 134.)

No implied promise to use skill.

An action will not lie against an arbitrator for want of skill in performing his duties, for the parties take him with all his faults; and even a person who is not an arbitrator in the strict sense of the term, but undertakes to conclude a disputed fact left to his decision, is not liable to an action for not using due skill in so (Pappa v. Rose, 20 W. R. 62.)

CHAP. IX.

It is a rule that in general an arbitrator cannot be Arbitrator made a party to a bill for the purpose of impeaching an dant to a bill award, and that if he is, he may demur to the bill as to impeach an well to the discovery as to the relief. (Steward v. East India Co., 2 Vern. 380; Mitford's Pl. 160.) In some cases, nevertheless, where an award has been impeached on the ground of gross misconduct in the arbitrators, and they have been made parties to the suit, the court has ordered them to pay the costs. (Chicot v. Lequesne, 2 Ves. sen. 315; Lingood v. Croucher, 2 Atk. 395; Hamilton v. Bankin, 3 De G. & S. 782.) In such cases a demurrer to the bill would not have been allowed (Mitford's Pl. 161); and in Lord Lonsdale v. Littledale (2 Ves. jun. 451), a demurrer by an arbitrator to a billof this nature was overruled; though not expressly upon the ground of the propriety of making an arbitrator a party, but because the bill charged certain specific acts of collusion between him and one of the parties, which the court thought required an answer. But although arbitrators may be made parties to a bill to set aside their award, they are not bound to answer as to their motives in making the award, and they may plead to that part of the bill in bar of such discovery (Anon., 3 Atk. 644): but it is incumbent on them, if they are charged with corruption and partiality, to support their plea by showing themselves incorrupt and impartial, or otherwise the court will give a remedy against them by making them pay costs. (Lingood v. Croucher, 2 Atk. 395; Padley v. Lincoln Waterworks Co., 2 M'N. & G.

68; Ponsford v. Swaine, 1 J. & H. 433.) No decree can be made against arbitrators for anything but the payment of costs (Steward v. East India Co., supra), and that, it is presumed, only when it is specifically prayed. (1 Daniell's Ch. Pr. 282, 620, 4th ed.)

The courts will always be disposed to view an arbitrator's conduct in the most favourable light; and, unless a clear case of corruption and partiality be made out against him, they will order his name to be struck out of a bill to which he has been made defendant. (Anon., 3 Atk. 644.) And where the arbitrator has accepted the office upon condition that the parties should undertake not to bring any suit in equity against him, and a suit is afterwards brought, and fraud and partiality are charged against him, the court will, upon motion, order his name to be struck out of the bill. (Ib.; Lingood v. Croucher, 2 Atk. 396; but see Scott v. Liverpool Corporation, 25 L. J., Ch. 227.)

When the arbitrators are properly made parties to a bill to be relieved against an award, the plaintiff is entitled to read their answer against their co-defendant, interested in the award, who contends that the award ought to be supported. (*Rybott* v. *Barrell*, 2 Eden, 131.)

# SECT. 4.—When an Arbitrator may be called as a Witness.

An arbitrator may often be called as a witness to prove facts which occurred or came under his notice during the reference. He cannot, however, be admitted, or called upon, to give evidence of any concessions made by one party during the reference for the purpose of

bringing peace and getting rid of a suit, but there is no objection to his proving regular admissions made by the parties in the course of the proceedings. (Westlake v. Collard, Bull. N. P. 230; Slack v. Buchanan, Peake, N. P. C. 6; Gregory v. Howard, 3 Esp. 113.) And an abstract furnished by one party before an arbitrator was admitted as evidence in a future suit, in a court of law, against the same party. (Doe v. Evans, 3 C. & P. 219.) But an arbitrator cannot be allowed, in a subsequent trial of the same cause of action, to prove the result of an examination of the parties or of an inspection of their books, pending a reference to him. (Habershon v. Troby, 3 Esp. 38.)

It has been held, in a recent case, that the evidence of an arbitrator is admissible to show whether or not he has awarded on matters beyond his jurisdiction. (Duke of Buccleuch v. Metropolitan Board of Works, 39 L. J., Ex. 130.) "Any attempt to annoy an arbitrator, by asking questions to show that he had mistaken the law, or found a verdict against the weight of evidence, should be checked, for these matters are irrelevant. But where the question is whether he did or did not entertain a question over which he had no jurisdiction, the matter is relevant, and nobody can be better qualified to give evidence on that matter than he." (Ib., per Blackburn, J.) And an opinion was entertained by Hart, L. C. of Ireland, in Brophy v. Holmes (2 Molloy, 1), that though an award was good on the face of it, and purported to be an adjudication on all matters in difference brought before the arbitrators, the arbitrators themselves might be examined whether they did in fact exercise the jurisdiction, and include in their consideration as matters in difference certain matters brought before them. In Re Rhys and Dare Valley Railway Co.

(37 L. J., Ch. 719), the evidence of an arbitrator was held admissible to show whether he had mistakenly awarded on wrong subject-matter, or made a mistake in legal principle going directly to the basis on which the award is founded;—though, in an old case, the court refused to allow the arbitrator to be called to give such evidence as would in fact contradict his award, the terms of the award being clear. (Shelling v. Farmer, 1 Str. 646.)

An arbitrator may be called to prove that certain matters were not included in matters referred (*Ravee* v. Farmer, 4 T. R. 146); or that a specific claim was not made before him. (*Martin* v. *Thornton*, 4 Esp. 180.) And he may be asked whether he was requested by either party to find on specific issues, he being authorized to award generally unless so requested. (*Wilson* v. *Hinckley*, 18 L. T., N. S. 695.)

The notes of evidence taken by an arbitrator are his own, and the court has no power to compel the production of them, or deal with them, any more than with a judge's minutes. (Scougull v. Campbell, 1 Chit. 283.)

#### CHAPTER X.

#### PROCEEDINGS BEFORE THE ARBITRATOR.

#### SECT. 1.—Preliminaries.

THE arbitrator having consented to undertake the office, one of the parties should apply to him for a written Procuring an appointment of a day for hearing the case. If a cause appointment for the is referred at nisi prius, the attorney of one of the hearing. parties should get the order of nisi prius from the associate, then get an appointment in writing from the arbitrator, and make a copy of the order of nisi prius and the appointment, and serve it on the opposite attorney. If the cause was referred by rule of court, the attorney should draw up the rule at the proper office; or if by judge's order, should draw up the order as already mentioned; get an appointment from the arbitrator, and serve a copy of the rule or order and appointment as above directed. (2 Chit. Arch. 1649-50, 12th edit.) In all other cases a notice of the time and place appointed by the arbitrator will be sufficient.

Where several arbitrators are appointed, they should all concur in naming a day, unless the submission empowers the majority to award, in which case the majority may appoint a reasonable time, and, if the others do not attend after notice of such appointment, may proceed in their absence. Absenting arbitrators should have notice of every meeting.

The submission or order of reference should be left

with the arbitrator that he may know the duties he has to perform, and the powers with which he is invested.

Power of arbitrator as to the proceedings.

The mode of conducting a reference lies almost wholly in the discretion of the arbitrator. He appoints the times and places of meeting, and adjournment, but they must be reasonable, and notice thereof must be given to both parties, or the award will be void (Oswald v. Grey, 24 L. J., Q. B. 69; Hobbs v. Ferrars, 8 Dow. 779; Anon., 1 Salk. 71);—but if nothing is done, except to adjourn, at a meeting of which no notice is given to one party, the award will not be bad. (Re Morphett, 2 D. & L. 967.) The arbitrator may revoke an appointment or insist upon it notwithstanding it may be inconvenient for one of the parties to attend (Eastham v. Tyler, 2 B. C. Rep. 136),—nor is it any ground to set aside an award that the solicitor of one of the parties says he cannot attend at the time the arbitrator appoints, he must attend if the time is reasonable, and, failing, the arbitrator may proceed in his absence. (Fetherstone v. Cooper, 9 Ves. 67.)

Furnishing arbitrator with statement of the case.

Attendance of counsel. It is not unusual for each party to furnish the arbitrator with a short statement of his case and a list of the witnesses he intends to produce. If briefs have been made out, and the arbitrator is a gentleman in the profession, this is usually done by delivering to him one of the briefs on each side. (2 Chit. Arch. 1650.)

When one party is about to employ counsel it is his duty to give notice thereof to the opposite party to enable him to do likewise (Whatley v. Morland, 2 C. & M. 347), though the arbitrator may in his discretion refuse to hear counsel. (In re Macqueen, 9 C. B., N. S. 793.) It is only usual for one counsel to attend on each side, but in cases of difficulty more than one on each side may attend, and their fees will be allowed on

taxation of costs. (Sinclair v. Great Eastern Rail. Co., 39 L. J., C. P. 165; L. R., 5 C. P. 135.)

It is said that there may be peculiar cases in which the Excluding the arbitrator would be justified in excluding the parties (pro-their attornies. vided he exclude both), and their attornies, during the examination of witnesses (Hewlett v. Laycock, 2 C. & P. 574; Matson v. Trower, 1 Ry. & M. 18; sed quære, 2 Lush's Practice, 1046); but such cases are exceedingly rare, and the tendency of modern decisions is to establish, that in conducting a reference the arbitrator should allow all the parties the amplest opportunities of elucidating and establishing their claims, and place no unreasonable or factious restrictions upon either party so as to prejudice his interests. Thus, we must regard In re Haigh's Estate (3 De G., F. & J. 157), in which an award was set aside because the arbitrator had excluded from some of the meetings, in a reference in which a partnership accounts were concerned, the son of one of the parties who was conversant with the accounts, and also a shorthand writer, both of whom the party wished to have present, as indicating the limits within which an arbitrator may exercise his discretion, rather than Tillam v. Copp (3 C. B. 211), in which an arbitrator in a farming case was held justified in excluding a stranger, skilled in agriculture, brought to assist the defendant's attorney in conducting the case. "Except in the few cases where exceptions are unavoidable," says Lord Langdale, "both sides must be heard, and each in the presence of the other." (Harvey v. Shelton, 7 Beav. 462.) And Turner, L. J., thus clearly defines the restrictions upon the arbitrator's power of exclusion: "Before he excludes anyone from attending on behalf of any of the parties interested, he is bound to ascertain that there is good reason for the exclusion, and to take

the best care he can that the party who is affected by the exclusion is not prejudiced by it." (In re Haigh's Estate, supra.)

Mode of proceeding, same as at nisi prius.

The mode of proceeding at a reference is, as near as may be, the same as in a cause at nisi prius. Thus, the party to begin makes a short statement of his case (this may, at the option of the arbitrator, be dispensed with), and then calls his witnesses in support of it, who of course may be cross-examined; the other party then makes a short statement of his case, and produces his evidence in support of it; he then replies on the whole case, and the party beginning has a general reply. If any question arises as to who is entitled to begin the arbitrator will decide it. The mode of conducting a reference being, however, in the discretion of the arbitrator, will sometimes vary from the above.

Arbitrator not bound by rules of practice.

It has been held that an arbitrator, though bound to act according to the general rules of law, is not bound by the strict rules of practice, but is to do justice between the parties according to the particular circumstances of the case. (In re Badger, 2 B. & A. 691; Prentice v. Reed, 1 Taunt. 151.)

Performance of conditions precedent. If the submission prescribe any act which is a condition precedent to the reference, it must be performed or the award will be bad. (Spence v. Eastern Counties Rail. Co., 7 Dow. 697.) It is in the discretion of an arbitrator, to whom an action for work has been referred, to inspect the premises on which the work was done, and his refusal to inspect is no ground for setting aside his award. (Mundy v. Black, 9 C. B., N. S. 557; 30 L. J., C. P. 193.)

#### SECT. 2. - Witnesses.

CHAP. X.

Previously to 3 & 4 Will. 4, c. 42, there was no Witnesses mode of compelling the attendance of witnesses before to attend an arbitrator. But under that act, where the submission is by rule of court, or judge's order, or at nisi prius in any action, or by an agreement which contains a consent to its being made a rule of court, the attendance of witnesses before an arbitrator, or the production of such documents as the person holding them would be bound to produce at a trial, may be compelled, either by a rule of court or a judge's order, the party, at the time of making the application, stating the county in which the witness lives, or that he cannot be found. An appointment of the time and place of attendance, signed by one at least of the arbitrators or by the umpire, must be served upon the witness, together with or after the rule or order, and his expenses tendered to him in the same manner as in the case of a trial; after which his disobedience to the rule or order will be deemed a contempt of court. But the witness shall not be compelled to attend more than two consecutive days, to be named in such order. (3 & 4 Will. 4, The rule is a rule absolute in the first c. 42, s. 40.) instance. (Re Guarantee Society and Levy, 1 D. & L. 907.)

This act does not empower a judge to make an order for the attendance of witnesses or production of documents in a reference at nisi prius, unless the order of nisi prius has been regularly drawn up (Curtis v. Bligh, 3 Jur. 1152); nor where the reference is by an instrument which contains no consent clause. (Re Woodcroft and Jones, 9 Dow. 538.) It does not restrict the power of the court, so as to prevent it order-

ing the production by the parties of all writings in their possession, when the submission contains an agreement that the arbitrator may call for the production of all writings. (Arbuckle v. Price, 4 Dow. 174.)

Habeas corpus to bring up prisoners. A habeas corpus may issue to bring up a prisoner for debt, to be examined before an arbitrator (Graham v. Glover, 25 L. J., Q. B. 10; 5 E. & B. 591; Marsden v. Overbury, 25 L. J., C. P. 200; 18 C. B. 34); so also where the witness is in prison on criminal process. (See 16 & 17 Vict. c. 30, s. 9.)

17 & 18 Vict. c. 125, s. 7. The C. L. P. Act, 1854, s. 7, enacts that "The proceedings upon any such arbitration as aforesaid shall, except otherwise directed hereby or by the submission or document authorizing the reference, be conducted in like manner, and subject to the same rules and enactments, as to the power of the arbitrator and of the court, the attendance of witnesses, the production of documents, enforcing or setting aside the award, and otherwise, as upon a reference made by consent under a rule of court or judge's order."

Applies to voluntary as well as compulsory references. This section applies to all references mentioned in sect. 5 of the same act, that is, to voluntary references where the submission may be made a rule of court, as well as to compulsory references (*Re Morris's Arbitration*, 6 E. & B. 383; 25 L. J., Q. B. 261; O'Flanagan v. Geoghegan, 16 C. B., N. S. 637); and a person appointed to state a special case is an arbitrator within the meaning of the act. (Graham v. Glover, 5 E. & B. 591; 25 L. J., Q. B. 10.)

But not to references which contain no consent clause. But the section does not apply to a reference under an instrument which contains no consent clause, but is made a rule of court under sect. 17 of the act (see Re Rouse and Meier, 19 W. R. 438); for if the application of sect. 39 of 3 & 4 Will. 4, c. 42, is excluded from Chap. X. such references, so is that of sect. 40.

Though before the C. L. P. Act, 1854, the Court of Court of Chancery had no power to compel the attendance of Chancery may witnesses (Hall v. Ellis, 9 Sim. 530), it may now do tendance of so; and whenever a submission to arbitration has been made a rule of the Court of Chancery, an order for the attendance of witnesses before the arbitrator may be obtained as of course. (Re Ricketts, 3 N. R. 56.)

The arbitrator may, if he think fit, exclude persons Witnesses may who are to be examined before him, whilst another until exwitness is undergoing examination or the like. (Hew-amined. lett v. Laycock, 2 C. & P. 574.)

The witnesses may be sworn by any one of the arbi- Examination trators or the umpire (3 & 4 Will. 4, c. 42, s. 41; 14 & of witnesses on oath. 15 Vict. c. 99, s. 16); and if the instrument of reference requires the evidence to be on oath, the arbitrator may not dispense with the formality without the consent. express or implied, of the parties (Ridoat v. Pve. 1 B. & P. 91; Allen v. Francis, 9 Jur. 691; Smith v. Sparrow, 16 L. J., Q. B. 139; Wakefield v. Llanelly Rail. Co., 34 Beav. 245); but the court will not set aside an award on the ground that the witnesses were not sworn, if the objection is not taken before the arbitrator. (Biggs v. Hansell, 16 C. B. 562.) If the instrument of reference leave the swearing of witnesses in the discretion of the arbitrator, he may, at his option, dispense with the oath, even though one of the parties request otherwise. (Smith v. Goff, 14 M. & W. 264.) Where the submission required the witnesses to be examined on oath and the arbitrator received some affidavits, the court set aside the award, holding that the deponents should have been examined vivá voce. (Banks v. Banks, 1 Gale, 46.)

A clause in the submission (sometimes, but very rarely inserted) directing the witnesses to be sworn before a judge or commissioner does not deprive the arbitrator of power to administer the oath. (Hodsoll v. Wise, 4 M. & W. 536; 7 Dow. 15.)

No particular form of words is necessary to make the oath binding. The following may be useful as a precedent:—

"You shall true answers make to all such questions as shall be asked of you, touching the matters in question between the parties to this reference: So help you God."

Should a witness be a Moravian or a Quaker, he may make an affirmation; or if, on any other grounds, he object to take an oath, he may make a promise and declaration as at nisi prius (32 & 33 Vict. c. 68, s. 4; 33 & 34 Vict. c. 49, s. 1); and the following form may be adopted in such a case:—

"I solemnly promise and declare that I will true answers make to all such questions as shall be asked me touching the matters in question between the parties to this reference."

Examination of the parties.

The parties to the reference may be examined as witnesses in the same manner as in an action at law. But when parties to a reference mutually agreed to strike out a clause giving power to the arbitrator to examine the parties, it was held that the examination of the plaintiff against the protest of the defendant's counsel was ground for setting aside the award. (Smith v. Sparrow, 4 D. & L. 240; 16 L. J., Q. B. 139.)

Witnesses privileged from arrest. Witnesses compulsorily attending a reference have the same privilege in being protected from arrest as witnesses attending courts of justice. (Moore v. Booth, 3 Ves. 350; Spence v. Stuart, 3 East, 89; Randall

v. Gurney, 3 B. & A. 252; 2 Taylor on Evidence, 1153.) And though a witness attend a reference voluntarily, he will still be protected, inasmuch as he might have been compelled to attend. (Webb v. Taylor, 1 D. & L. 676, per Patterson, J.)

If upon oath or affirmation before an arbitrator any Punishable person making the same shall wilfully and corruptly for perjury. give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly. (3 & 4 Will. 4, c. 42, s. 41; Arch. Crim. Pl. 815, 17th edit.)

#### SECT. 3.—Evidence.

Arbitrators are bound by the same rules of evidence Power of as courts of law. (Att.-Gen. v. Davison, 1 M'Cl. & arbitrator to decide ques-Y. 160.) The arbitrator is the judge of the admissi-tions of bility of evidence so far as the competency of the witnesses is concerned, and if he receive the evidence of an incompetent or reject that of a competent witness, the court will not generally set aside the award (Lloyd v. Archbowle, 2 Taunt. 324; Perryman v. Steggall, 9 Bing. 679; Armstrong v. Marshall, 4 Dow. 593; Hagger v. Baker, 14 M. & W. 9; Eastern Counties Rail. Co. v. Robertson, 6 M. & G. 38; 1 D. & L. 498; Scott v. Van Sandau, 6 Q. B. 237); and his decision on the admissibility of evidence before him is final. (Symes v. Goodfellow, 2 Scott, 769; 2 Bing. N. C. 532.) But he is not absolute judge of the materiality of evidence, and exercising any discretion as to the amount of evidence, or rejecting evidence on any matter which he may think foreign to the subject of the reference, is a step that should be taken with

great caution (Johnstone v. Cheape, 5 Dow. 247), for if he refuse evidence of matters within the scope of the reference, under the mistaken impression that they are not within it (Samuel v. Cooper, 2 A. & E. 752; Brophy v. Holmes, 2 Molloy, 1), or refuse to examine a material witness because he thinks there is sufficient evidence without (Phipps v. Ingram, 3 Dow. 669), it will invalidate the award. But the evidence or witness must have been actually tendered.

An affidavit to set aside an award on the ground that the arbitrator has refused to examine a material witness should state what reason, if any, he gave for refusing to hear the witness. (*Bradley* v. *Ibbetson*, 2 L. M. & P. 583.)

When arbitrator may refuse to hear evidence.

There are cases in which the arbitrator may refuse to hear evidence, as in a reference to a person of skill in the matters in difference, to decide points, upon which from his knowledge and experience, he is competent from personal observation to form a judgment without the assistance of witnesses. (Eads v. Williams, 24 L. J., Ch. 531; Johnstone v. Cheape, 5 Dow. 247.) But it must have been expressly stated, or necessarily implied, that the reference is to the skill alone of the arbitrator, for if a matter be referred to him, not solely on the ground of his peculiar knowledge, he may not decide without receiving evidence, notwithstanding the matters may almost tell their own tale. (Anon., 2 Chit. 44.) It is said that a usage to that effect will justify an arbitrator in deciding matters without receiving evidence. Thus in Oswald v. Grey (24 L. J., Q. B. 69), it was held that a usage for arbitrators appointed to determine, as between outgoing and incoming tenants of a farm, the value of away-going crops, and the deductions for want of repairs of the farm buildings and fences, to make

their award on inspection of the crops and premises, without notice to the parties and without evidence, may be good. But no usage would be legal for arbitrators to make their award, not on a mere view, but upon the examination of the witnesses of the one party in the absence of the other, and without notice to the latter. (Re Brook and others, 16 C. B., N. S. 403; 33 L. J., C. P. 246.)

Where evidence is received, it should always be taken Evidence must in the presence of all the parties or of some one attend- be received in presence of all ing on their behalf. (Plews v. Middleton, 6 Q. B. parties. 845.) An arbitrator may not hear the evidence of one party and refuse to receive the evidence of the other (Phipps v. Ingram, 3 Dow. 669; Braddick v. Thompson, 8 East, 344; Sharpe v. Bickerdyke, 3 Dow. 102), nor, unless where justifiably proceeding ex parte, should he examine one of the parties (Re Hick, 8 Taunt. 694), or the witnesses on one side (Pepper v. Gorham, 4 Moore, 148; Walker v. Frobisher, 6 Ves. 70), in the absence of the other party, nor even in the absence of both parties. (Plews v. Middleton, supra; Kingwell v. Elliott, 7 Dow. 423.) If he do, the award will be set aside, notwithstanding the arbitrator may swear that the evidence thus received had no effect upon his award (Walker v. Frobisher, 6 Ves. 70; Dobson v. Groves, 6 Q. B. 637; Fetherstone v. Cooper, 9 Ves. 67), unless the objection be waived.

Where a letter book containing copies of letters which had been adduced in evidence before an arbitrator, and marked by him as read, was, at the close of the case, left in his hands in order that he might, before making his award, refer to the copies so adduced, and he referred to a copy of a letter which had not been so marked, the court directed that the case should be

referred back to the arbitrator in order that the party against whom the letter complained of had been used might have an opportunity of explaining its contents, but refused to set aside the award. (Davenport v. Vickery, 9 W. R. 701.)

Private communications. If one party make any private written communication to the arbitrator touching the subject-matter of reference, the arbitrator should inform the other party, or hand the communication over to him. (*Harvey* v. Shelton, 7 Beav. 462; 13 L. J., Ch. 466.)

Inquiry whether party disputes items. In Anderson v. Wallace (3 C. & F. 26) it was decided that an award was not invalidated by the arbitrator, in the absence of one of the parties, calling on the other party and asking him whether he admitted or disputed certain items in an account, and merely taking his answer to that question. But had he received any explanations of items in the absence of the other party it would be different. (Re Haigh's Estate, 3 De G., F. & J. 157.)

No information should be received behind the back of a party. The only safe course for an arbitrator, unless proceeding ex parte, is to insist that all information in the matter in reference, communicated by one party, or his witnesses, or agents, shall be in the presence of the other. (Drew v. Leburn, 2 Macq. 1.)

Irregularities may be waived. Any objection to irregular or improper conduct on the part of the arbitrator may be waived by the parties, either expressly or by their conduct (In re Salkeld, 12 A. & E. 767; Re Jenkins, 1 Dow., N. S. 276; Bignall v. Gale, 2 M. & G. 830), providing the party waiving have full knowledge of the defect. (Darnley, Earl v. London, Chatham and Dover Rail. Co., L. R., 2 H. of L. Cas. 43.) Where it comes to the knowledge of a party that the arbitrator has examined witnesses in his absence, he should at once abandon the reference, for

if he continue to attend the subsequent proceedings this will be a waiver. (Drew v. Drew, 25 L. T. 282.) Where, pending a reference the umpire held a communication with the agents of one of the parties, this fact being known to all the parties at the time, and not objected to by any of them, and the reference having proceeded and the award being subsequently made, it was held that neither of the parties could object to the award on the ground of such communication, having acquiesced in it. (Mills v. Bowyer's Society, 3 K. & J. 66; Hamilton v. Bankin, 19 L. J., Ch. 307.)

An arbitrator may receive evidence upon matters Receiving denied by one of the parties to be in difference, and, matters not provided his award does not exceed his authority, it within the will not be thereby invalidated (Arbuckle v. Price, 4 Dow. 174); and he may inquire into collateral matters necessary to decide the matters submitted. Counties Rail. Co. v. Robertson, 1 D. & L. 498.)

But if a party to a reference objects that the arbitrator is entering on the consideration of a matter not referred to him, and protests against it, and the arbitrator nevertheless goes into the question and receives evidence on it, and the party, still under protest, continues to attend before the arbitrator and cross-examines the witnesses on the point objected to, he does not thereby waive his objection, nor is he estopped from saying that the arbitrator has exceeded his authority by awarding on the matter. (Davies v. Price, 34 L. J., Q. B. 8.)

The arbitrator before closing the hearing should Giving time (Doddington v. duction of receive all the evidence on both sides. Hudson, 1 Bing. 384; Phipps v. Ingram, 3 Dow. evidence. 669.) When the parties require further time for the production of evidence, it is generally in the power of

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the arbitrator to decide whether the party so applying has made out such a case as ought to induce him to put off the further hearing, or postpone his award (Ringer v. Joyce, 1 Marsh. 404; Ginder v. Curtis, 14 C. B., N. S. 723); although the courts do not regard this as a fixed rule applicable to every case (Spettigue v. Carpenter, 3 P. W. 361); and the arbitrator ought generally to comply with the request, if it is made on reasonable grounds. (Solomon v. Solomon, 28 L. J., Ex. 129.) It is in the discretion of the arbitrator whether he will give time for one of the parties to bring a material witness from abroad. (Ginder v. Curtis, supra.) And when an application was made to arbitrators to afford time to obtain and examine a witness who was absent, and they honestly (though erroneously) exercised their discretion as to the materiality of his evidence, and refused time, the court would not set aside the award. (Larchin v. Ellis, 11 W. R. 281.)

Notes should be taken. Notes of the evidence should be taken by the arbitrator, even though the case is short. (*Croom* v. *Gore*, 1 H. & N. 14; 25 L. J., Ex. 267.)

Arbitrator's power to consult persons of skill and science. It is said that an arbitrator may consult men of science in every department, where it becomes necessary (Caledonian Rail. Co. v. Lockhart, 3 Macq. 808, per Lord Wensleydale); and though he cannot agree beforehand to be bound by whatever opinion another may give, for that would be a delegation of his authority, he may submit a question to another person of skill or science, and adopt the opinion given thereon as his own (Emery v. Wase, 5 Ves. 846; 8 Ves. 504; Gray v. Wilson, 35 L. J., C. P. 123), but only if he believes it to be correct. (Eads v. Williams, 24 L. J., Ch. 531.) Under an authority to arbitrators to call in a competent person to assist them in the valua-

tion of the stock and property of a partnership, it is no objection to their award that they have availed themselves of the assistance of such a person in deciding on the partnership accounts; the arbitrators by adopting in terms the opinions of such person do not constitute him an umpire, but make his opinions their own, and their award cannot be impeached on that account. (Anderson v. Wallace, 3 C. & F. 26.) And so, where matters in difference being referred to two arbitrators, the parties consented that they might in case of difficulty consult a third person, who was named, and the arbitrators did so on one out of the whole number of questions arising in the investigation, and they adopted the opinion which he gave them upon it, without, as far as appeared, exercising any independent opinion, and made their award on the whole of the matters referred, it was held that the award was not thereby invalidated. (Whitmore v. Smith, 31 L. J., Ex. 107; 8 Jur., N. S. 514.) When, however, it is desired to obtain the assistance of a valuer, or scientific, or skilled person on a matter of fact, the best way to do so is to examine him as a witness. (Anderson v. Wallace, supra, per Lord Brougham; Hopcraft v. Hickman, 2 S. & S. 130.)

A lay arbitrator may consult counsel on the admis- Legal sibility of evidence, or as to the framing of his award (Re Hare, 6 Bing. N. C. 158; Dobson v. Groves, 6 Q. B. 637); or he may employ a professional man to draw up his award so as to make it good in point of form (Fetherstone v. Cooper, 9 Ves. 67; Baker v. Cotterill, 18 L. J., Q. B. 345; Galloway v. Keyworth, 23 L. J., C. P. 218, but it should not be the attorney of either of the parties. (Underwood v. Bedford and Cambridge Rail. Co., 11 C. B., N. S. 442.) A re-

cital in an award that it had been drawn by a person, who under the terms of the submission attended the arbitrator as his attorney, was held to show no improper delegation of authority. (Baker v. Cotterill, supra.)

Lay arbitrator entitled to a legal adviser. As a general rule a lay arbitrator will be entitled to have a legal adviser to sit with him in the reference, for where the parties appoint a lay arbitrator, if the reference is to be brought to a safe conclusion, it is almost of necessity that he should have professional assistance in the conduct of it. (Threlfall v. Fanshawe, 19 L. J., Q. B. 334, per Coleridge, J.) But where one of the parties had expressly objected to a legal arbitrator, and a lay arbitrator was appointed, the arbitrator so appointed was held not to be entitled to have an attorney to sit with him. (Procter v. Williams, 29 L. J., C. P. 157; 8 C. B., N. S. 386.)

Employing accountant.

When an arbitrator in taking accounts is authorized under the reference to appoint an accountant, "not objected to by any of the parties," he may not appoint one without communicating with the parties. (In re Tidswell, 33 Beav. 213.)

Power to proceed ex parte.

An arbitrator has power, subject to his discretion, to proceed ex parte upon good cause, as, for instance, where one of the parties keeps back his evidence to delay the reference (Hetley v. Hetley, Kyd on Awards, 100), or will not attend, the appointment being for a reasonable time, and the arbitrator is convinced that the object of non-attendance is to defeat the reference. (Wood v. Leake, 12 Ves. 412; Waller v. King, 9 Mod. 63.) Where one party has ineffectually attempted to revoke the submission and refused afterwards to attend the reference, the arbitrator may proceed ex parte. (3 & 4 Will. 4, c. 42, s. 39; Harcourt v. Ramsbottom, 1 J. & W. 512.) And in Hobbs v. Ferrars (8 Dow. 779), it

was held that the arbitrator might proceed ex parte, after notice, where one party became insolvent. an arbitrator should not proceed ex parte if there is a reasonable excuse for a party's non-attendance. (Gladwin v. Chilcote, 9 Dow. 550; Procter v. Williams, 29 L. J., C. P. 157; 8 C. B., N. S. 386.)

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Where it is intended to proceed ex parte the arbi- Giving notice trator should generally give notice of such intention proceedings. to the absenting party, either verbally or in writing. (Gladwin v. Chilcote, supra.) But where an arbitrator had made an appointment for a meeting on the premises, for the purpose of a view "and to go into the reference," and one of the parties, although under the mistaken notion that there would be notice of another meeting before an award was made, went away without obtaining any other appointment, or intimating his desire to offer evidence, or to make any defence, the arbitrator was held entitled to proceed ex parte and without further notice to make an award. (Tryer v. Shaw, 27 L. J., Ex. 320.) So where an arbitrator having, in the course of the reference, appointed a meeting for a certain day, was informed by the defendant that he did not intend to be present, one of his reasons being that on account of the non-admissibility of certain depositions, which the arbitrator had not rejected as evidence, no award he could make would be valid, and another reason being that the notice (seventeen days) was too short; the arbitrator was held to have acted rightly in proceeding ex parte, though he had not warned the defendant that if he absented himself the arbitration would proceed. (Scott v. Van Sandau, 6 Q. B. 237.) Objections on the ground of want of notice will be waived by attendance at subsequent

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meetings. (Bignall v. Gale, 9 Dow. 631; 2 M. & G. 830.)

Case closed, parties should be informed. The evidence being closed, the arbitrator should inform both parties that he considers the case closed, and that he shall proceed to make his award. (Earle v. Stocker, 2 Vern. 251; Peterson v. Ayre, 23 L. J., C. P. 129.) Where arbitrators who had proceeded in a reference informed the defendant that they would suspend their proceedings till the books of account had been referred to, it was held that afterwards making an award in his absence, without examining the books of account, was ground for setting it aside. (Pepper v. Gorham, 4 Moore, 148.)

Re-opening the case.

When the case has been formally closed, the arbitrator may, if he think fit, allow the production of further evidence. (Bignall v. Gale, supra.)

#### CHAPTER XI.

#### THE AWARD.

### SECT. 1.—Form and general requisites of an Award.

THE evidence on both sides being fully heard and the CHAP. XL case closed, the arbitrator proceeds to make his award. Time within It must be made within the time limited for that pur- which award must be made. If he has until a certain day, "until" will be construed as inclusive (Knox v. Simmonds, 3 Bro. C. C. 358); and if he has a certain length of time "after" matters are referred, the day of reference is excluded. (Re Higham and Jessop, 9 Dow. 203.) A limitation in "months" simply, will be construed as lunar not as calendar months. (Re Swinford, 6 M. & S. 226.) The arbitrator has no power to shorten the time given by the submission. (Re Morphett, 2 D. & L. 967.)

The arbitrator is not bound to make an award, notwithstanding he has held several meetings. (Lewin v. Holbrook, 11 M. & W. 110; Crawshay v. Collins, 1 Swanst. 40.)

It is not necessary to the validity of an award that Form of the it should be in any precise form of words or make use of any technical expressions (Eardley v. Steer, 4 Dow. 423); it is enough if it clearly show that the arbitrator has finally decided on the matter submitted to him. (Archer v. Owen, 9 Dow. 341; Bradbee v. Christ's Hospital, 2 Dow. N. S. 164; Law v. Blackburrow, 23 L. J., C. P. 28; Whitehead v. Tattersall,

1 A. & E. 491.) Even an award in the form of an opinion has been held sufficient (Matson v. Trower, R. & M. 17); so has an award of a sum in favour of one party and a request to the other party to pay. (Smith v. Hartley, 10 C. B. 800.) But a letter from the arbitrator to the parties, in which he said, "To meet the circumstances of the case in a liberal manner I propose that Mr. V. shall pay Mr. L. 101.," was held not to be an award but a mere recommendation. (Lock v. Vulliamy, 5 B. & Ad. 600; and see Fergusson v. Norman, 4 Bing. N. C. 52.) An arbitrator ill fulfils his task who makes his award in a loose and ambiguous manner.

Recitals

Recitals, though usual, are not necessary in an award. Thus, the omission to recite an enlargement of time (George v. Lousley, 8 East, 13), or a view of the premises required by the submission (Spence v. Eastern Counties Rail. Co., 7 Dow. 697), or the performance of any other condition precedent (Davies v. Pratt, 17 C. B. 183; 25 L. J., C. P. 71), is no objection to an award.

When made, the recitals should show, (1) the authority of the arbitrator, (2) the subject-matter with which he has to deal, (3) the powers that have been exercised, (4) the powers to be exercised by the award, and (5) the performance of conditions prescribed by the submission,—in fact, the draftsman, in his recitals, will be governed by the particular circumstances of the case and those considerations which are entertained by a conveyancer in an ordinary instrument made in pursuance of a power.

Effect of recitals.

Recitals are not without importance, for they will often explain what would otherwise be an ambiguous award. But a misrecital (White v. Sharp, 12 M. & W.

712; Re Addison, 18 L. J., Q. B. 151; Re Lloyd and Spittle, 6 D. & L. 531), or a false recital (Adams v. Adams, 2 Mod. 169; Trew v. Burton, 1 C. & M. 533; Harlow v. Read, 1 C. B. 733; 3 D. & L. 203), will not vitiate an award; nor, on the other hand, will a bad award be helped by a misrecital. (Price v. Pophin, 10 A. & E. 139.)

A plan may be annexed to an award and incorporated Plans and with it, and the words of explanation on the map may writings incorporated by be taken as part of the award. (Johnson v. Latham, reference. 20 L. J., Q. B. 236.) So an indenture or other writing may be incorporated by reference without setting it out. (Anon., 1 Vent. 87.)

The award must be made and executed with all the Formalities formalities required by the submission, otherwise it will requisite. not be valid (Everard v. Paterson, 6 Taunt. 625; Henderson v. Williamson, 1 Stra. 116); if, however, nothing is said in the submission as to the form of the award, the arbitrator may adopt such formalities as he chooses, or may make a verbal award. (Hanson v. Liversedge, 2 Vent. 242; Rawling v. Wood, Barnes, 54; Oates v. Bromil, 1 Salk. 75.) This now, however, When reapplies only to awards in pursuance of submissions in writing. which contain no agreement for making them rules of court, for 17 & 18 Vict. c. 125, s. 15, enacts, that an "arbitrator acting under any such document or compulsory order of reference as aforesaid, or under any order referring the award back, shall make his award under his hand," &c. The chief statutory enactments for arbitration provide for the awards being made in An award under the L. C. C. Act, 1845, or the Railway Clauses Act, 1845, must not only be in writing, but must have the declaration made and subscribed by the arbitrator before entering on the reference annexed to it when made (8 & 9 Vict. c. 18, s. 33; 8 &

9 Vict. c. 20, s. 134); and under the former act must be delivered to the promoters of the undertaking (s. 35).

Witnesses.

The award is usually signed in the presence of an attesting witness.

Joint arbitrators must execute together. Where there are two or more arbitrators, all (or the majority required by the submission) must execute the award at the same time and place and in the presence of each other (Peterson v. Ayre, 15 C. B. 724; Wade v. Dowling, 23 L. J., Q. B. 302; 4 E. & B. 44; Eads v. Williams, 24 L. J., Ch. 531): though omission to do so would not be fatal, as the court, on application, would send it back to the arbitrators to be re-executed. (Anning v. Hartley, 27 L. J., Ex. 145.) Where an award purported on the face of it to be the award of three arbitrators, but it was signed by two only, yet, as by the submission it was to be by the three or any two of them, it was held a good award of the two. (White v. Sharp, 12 M. & W. 712.)

If the submission be to perform the award of the arbitrators and their umpire, it would seem that an award by the arbitrators alone is bad (Heatherington v. Robinson, 7 Dow. 192); and where the reference was to the award of two persons named and of such person as they should nominate before they proceeded to act, or of a majority of them in case they could not unanimously agree, it was held that no award of two could be good until the third had had a full opportunity of joining in it, and had declared his dissent from it or withdrawn from the reference. (Re Templeman and Reed, 9 Dow. 962.)

"Publishing" and "delivering" the award.

When the submission provides that the award "shall be made and published ready for delivery to the parties" on a day named, it is considered to be published when executed, though no notice has been given to the parties (*Henfree* v. *Bromley*, 6 East, 309; *Brooke* v. *Mitchell*,

6 M. & W. 473); and "ready for delivery" means delivery on request. (Veale v. Warner, 1 Saund. 327 b; Wilson v. Wilson, ib. 327 c.) But for the purpose of setting aside the award it is only considered to be published when notice that it is made is given to the parties, and time only begins to run from then. If the submission is that the arbitrator shall deliver his award to the parties it is not complete until actual delivery, and where it is to be delivered to either of the parties it must be delivered to each or it is not binding. (Hungate's Case, 5 Rep. 103; Block v. Palgrave, Cro. Eliz. 797.)

The usual practice in the delivery of an award is to give the stamped award to the party in whose favour it is made, and an unstamped copy to the other party.

When an arbitrator has executed a paper as and for An award canhis award, and it purports on the face of it to be his award, then he is functus officio, and cannot of his own authority remedy any mistake or blunder that he may have made in executing it. (Mordue v. Palmer, 40 L. J., Ch. 8; Brook v. Mitchell, 6 M. & W. 477.) Thus, where an arbitrator has made a mistake in the calculation of figures (Irvine v. Elnon, 8 East, 54), or has put the plaintiff's instead of the defendant's name in the direction to pay costs (Ward v. Dean, 3 B. & Ad. 234), or has executed an engrossed copy which omits some words contained in the draft award (Mordue v. Palmer, supra), he cannot correct the mistake even within the time fixed for making his award, unless by consent of If he does make such an alteration, the alteration will be nugatory as though it were by a stranger, and the award as originally written will stand good, if the original matter be still legible. (Henfree v. Bromley, 6 East, 309.) An alteration by a stranger in an award will not affect it, but leaves it in the state it was before such alteration. (Trew v.

Burton, 1 C. & M. 533.) Where a mistake has been made the court or a judge may send the award back to the arbitrator to be amended. (17 & 18 Vict. c. 125, s. 8.)

Stamping an award.

An award must be properly stamped, for though an omission or defect in this respect is no ground for setting the award aside (*Preston v. Eastwood*, 7 T. R. 95), yet it cannot be legally enforced, and it is competent for the officer who is to draw up the rule for attachment for non-performance of the award, to refuse to do so on this ground. (*Hill v. Slocombe*, 9 Dow. 339.) It may be stamped at any time on paying the penalty.

Where there are several parties to an instrument of submission having a community of interest in the subject-matter referred, if the award be stamped with one stamp it is sufficient. (Goodson v. Forbes, 6 Taunt. 171.)

The following are now the stamps to be impressed upon awards, under 33 & 34 Vict. c. 97:—

|                                    |            |           |          |         | £ | s. | d. |
|------------------------------------|------------|-----------|----------|---------|---|----|----|
| Where the                          | amoun      | t or valu | e of the | matter  |   |    |    |
| in dispute                         | does 1     | not excee | d £5     |         | 0 | 0  | 3  |
| Exceeds £5 and does not exceed £10 |            |           |          |         | 0 | 0  | 6  |
| "                                  | 10         | ,,        | ,,       | 20      | 0 | 1  | 0  |
| ,,                                 | 20         | ,,        | ,,       | 30      | 0 | 1  | 6  |
| ,,                                 | <b>30</b>  | ,,        | ,,       | 40      | 0 | 2  | 0  |
| ,,                                 | 40         | ,,        | ,,       | 50      | 0 | 2  | 6  |
| ,,                                 | <b>50</b>  | ,,        | ,,       | 100     | 0 | 5  | 0  |
| ,,                                 | 100        | ,,        | ,,       | 200     | 0 | 10 | 0  |
| ,,                                 | 200        | ,,        | ,,       | 500     | 0 | 15 | 0  |
| ,,                                 | 500        | ,,        | ,,       | 750     | 1 | 0  | 0  |
| ,,                                 | <b>750</b> | ,,        | ,,       | 1,000   | 1 | 5  | 0  |
| And w                              | here it    | exceeds   | £1,000   | and in  |   |    |    |
| any                                | other o    | ase not   | above p  | rovided |   |    |    |
| for.                               |            |           |          |         | 1 | 15 | 0  |

Upon a compulsory reference under the C. L. P. Act, 1854, or upon any reference by consent of parties Special case. where the submission is or may be made a rule or order of any of the superior courts of law or equity at Westminster, it shall be lawful for the arbitrator, if he shall think fit, and it is not provided to the contrary, to state his award as to the whole or any part thereof, in the form of a special case for the opinion of the court; and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the court. (17 & 18 Vict. c. 125, s. 5.) This judgment is not such as a writ of error will lie on it within the 32nd section of the statute. (Gunner v. Fowler, 29 L. J., Q. B. 189.)

By the General Rules of Michaelmas Vacation, 1854, r. 14, it is ordered, "In the special case the arbitrator must state whether the arbitration is under a compulsory reference under this act, or whether it is upon a reference by consent of parties where the submission has been or is to be made a rule or order of one of the superior courts of law or equity at Westminster. the former case the award must be entitled in the court and cause, and the rule or order of the court must be In the latter case the terms of the reference relating to the submission being made a rule or order of court, must be set forth."

It is not compulsory on an arbitrator on the demand of either party to state a case under this section. guley v. Markwick, 30 L. J., C. P. 342; 10 C. B., N. S. 61; Holloway v. Francis, 9 C. B., N. S. 559.) But whilst the reference is pending before the arbitrator either party may apply to a judge under sect. 4 for an interim order to state a case. (Ib.)

If the submission makes provision for a special case,

and provides that the arbitrator shall state a case at the request of the parties, he is bound to do so or his award will be bad. (Bradbee v. Christ's Hospital, 4 M. & G. 714.) But if the terms of the submission give him a mere option to state a case, he is not bound to do so, unless he think fit. (Wood v. Hotham, 5 M. & W. 674.)

Certificate in what cases.

Where a verdict is taken at nisi prius, and the arbitrator has merely to certify the amount of damages for which the verdict is to be entered up, the certificate does not require a stamp. If there be nothing in the terms of the reference which obliges him to certify within any limited time, there is no rule of practice which obliges him to certify before the return of the jury process. (Salter v. Yeates, 2 M. & W. 67.) The certificate should indicate exactly the manner in which the postea is to be drawn up, in the same manner as if a verdict had been given: if both parties be entitled respectively to verdicts on different issues it should state it, or if an issue is to be taken distributively, and part found for one party, part for another, it should point out the manner in which the verdict is to be entered. No order of nisi prius is necessary where the arbitrator is thus empowered to certify. (Tomes v. Hawkes, 10 A. & E. 32.)

# SECT. 2.—An Award must not exceed the Submission.

An award must not go beyond the submission in things, in person, or in time, or exceed the power given by the submission in the particular case. (Watson on Awards, 179.)

If an award extend to matters not within the scope of Chap. XI. the submission it will be void, at least as to so much as An award in is in excess of the submission. (Hill v. Thorn, 2 Mod. submission bad 209:—as to what matters are embraced in a submis- pro tanto. sion, see ante, p. 40.) A misrecital will not vitiate an award not otherwise exceeding the submission (Adams v. Adams, 2 Mod. 169; M'Cabe v. Gray, 13 Ir. L. Rep. 343), nor will an award be bad which extends to matters contemplated though not expressly named in the submission. (Onyons v. Cheese, 1 Lut. 530.) But where the award is palpably in excess of Examples of the authority, as (in an old case) an award of a real awards. action in a submission of all personal actions it is void. (Marks v. Marriott, 1 Ld. Raym. 116.) So if a cause only is referred, the arbitrator cannot decide other matters in difference between the parties. (Atkinson v. Jones, 1 D. & L. 225.) If the submission is as to the boundaries of certain land and he enters into the question of title and decides it, or the like, the award will be bad (Doe d. Ld. Carlisle v. Bailiff of Morpeth, 3 Taunt. 378); though he may inquire into matters dehors the matter referred, if it is necessary for adjudicating upon the matters referred. (Eastern Counties Rail. Co. v. Robertson, 6 Scott, N. R. 802.) If he decide upon a right not claimed, or matters abandoned by the parties (Hooper v. Hooper, M'Cl. & Y. 509; Crawford v. London Dock Co., 2 Cr. & M. 637; Bird v. Cooper, 4 Dow. 148), or expressly excluded from (Harris v. Thomas, 2 M. & W. 32), or not included in the submission (Poyner v. Hatton, 7 M. & W. 211; Skipper v. Grant, 10 C. B., N. S. 237), or decide as to persons who are not parties to the submission (Fisher v. Pimbley, 11 East, 188), or direct an act to be done by a stranger (Cooke v. Whorwood, 2 Saund. 337; Lee

v. Elkins, 12 Mod. 585; Proudfoot v. Poile, 3 D. & L. 524), or order something to be done upon the land of a stranger (Turner v. Swainson, 1 M. & W. 572), or direct any acts to be done affecting the property of a stranger, unless they are conditional upon the stranger's consent (Taverner v. Skingley, Roll. Ab. "Arb." E. 3; Nicholls v. Jones, 6 Ex. 373), the award will be bad. An arbitrator may, however, make the performance of some act by a stranger a condition precedent to some other act to be done by one of the parties. (Kirk v. Unwin, 6 Ex. 908.)

Award in favour of a stranger.

An award made in favour of a person who is a stranger to the submission is bad unless it be beneficial to the party entitled to receive satisfaction, and the advantage to the party should appear on the face of the award. (Bird v. Bird, 1 Salk. 74; Laing v. Todd, 13 C. B. 276.) But an award has been held good that one party should pay a specified sum to the servant of the other party. (Dudley v. Mallery, 3 Leon. 62), or to a stranger to discharge a debt owing by the other party (Bedam v. Clerkson, 1 Ld. Raym. 123), or to a stranger who is agent of the other party. (Dale v. Mottram, 2 Barnard. 291; Norwich's Case, 3 Leon. 62; Snook v. Hellyer, 2 Chit. 43.) So has an award to pay to "the plaintiff or to A. his attorney" (Hare v. Fleay, 11 C. B. 472), as also a direction to pay to one of the arbitrators, to be by him immediately paid over to one of the parties. (Adcock v. Wood, 6 Ex. 814; 7 Ex. 468; 21 L. J., Ex. 204.)

Matters arising after the submission. An arbitrator may not award the payment of a debt which has accrued after the parties entered into the submission (Banfill v. Leigh, 7 Dow. 175), or the payment of rent not due at the date of the award. (Barnardiston v. Fowler, 10 Mod. 204.)

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It was referred to an arbitrator to determine of and concerning all matters of account then depending between A. and B., and the arbitrator awarded that no partnership existed between A. and B. in respect of the W. C. farm; and that A. should pay to B. the sum of 1,371l. 17s. due from him to B. in respect of shares in the C. Company; and that on payment of such sum, B. should deliver to A. 118 shares in the said company held by him as collateral security for the said sum; the award was held not to exceed the arbitrator's authority. (Harrison v. Lay, 13 C. B., N. S. 528.)

An arbitrator must decide the actual questions and matters referred to him, and may not in lieu thereof award what he thinks is an equitable arrangement. (Anon., Dyer, 242 a.)

An arbitrator may in his award give any directions Implied power (provided they are not illegal or to be performed by to give directions. strangers) necessary to decide the points submitted to him (Pascoe v. Pascoe, 3 Bing. N. C. 898); but unless there be some clause empowering him to say what shall be done, or the nature of the reference imply or require it, the arbitrator is rarely justified in giving any particular directions respecting property in dispute. in a reference touching the sufficiency of a doubtful title, it was held that the arbitrator was not justified in awarding that the purchaser should take it with all its faults (Ross v. Boards, 8 A. & E. 290); and in a dispute concerning the right to fixtures, he was held not to be empowered to order their replacement. (Price v. Popkin, 10 A. & E. 139.) So, on a reference as to rent, an arbitrator cannot award a power of distress unless expressly authorized to do so. (Pascoe v. Pascoe, supra.)

What directions may be given on partnership references.

On a submission of all matters in difference between partners, the arbitrator may award a dissolution of the partnership (Green v. Waring, 1 W. Bl. 475; Hutchinson v. Whitfield, Hayes (Ir. Ex.), 78), but he is not bound to do so. (Simmonds v. Swaine, 1 Taunt. 548.) An arbitrator who had authority to decide on what terms a partnership agreement should be cancelled, directed, amongst other things, that one of the partners should have all the debts due to the firm, and should, if necessary, sue for them in the name of his late partner, was held not to have exceeded his authority (Burton v. Wigley, 1 Bing. N. C. 665); and where a submission empowering an arbitrator to settle terms of dissolution provided that one of the partners should still carry on the business, an award that the other should not carry on the same business within thirteen miles of the particular town was held good. (Morley v. Newman, 5 D. & R. 317.) In Wood v. Wilson (2 C. M. & R. 241), the submission gave power to the arbitrator to direct a division of the partnership effects, and contained an agreement that each of the two partners would execute to the other conveyances according to such division, an award that one partner should purchase the share of the other was upheld. (See 2 Lindley, 854.)

In a recent case, on a dissolution of partnership between A. and B., A. offered to sell his interest to B. for 20,000l., B. refused, but offered to buy it for 18,000l., which A. refused, and it was referred to C. to say what price should be paid by B. for A.'s interest; it was held that C. had no authority to name a price outside the limits of those two sums. (*Thomson* v. *Anderson*, L. R., 9 Eq. 523; 39 L. J., Ch. 468.) The principle of this case applies to any reference between vendor and purchaser.

award releases.

On a general reference of all matters in difference, the arbitrator has authority to order the parties to exe- Power to cute mutual releases if confined to the matters referred (Cable v. Rogers, 3 Bulst. 311; Ingram v. Milnes, 8 East, 445; Goddard v. Mansfield, 1 L. M. & P. 25); but where a cause only is referred he has no such power. (Doe d. Williams v. Richardson, 8 Taunt. 697.) The form of the release need not be indicated by the arbitrator (Toby v. Lovibond, 17 L. J., C. P. 201); nor should he order it to be settled by a third party. (Goddard v. Mansfield, supra.)

Where the arbitrator has to decide upon disputes And conveyconcerning real property, and he has express or implied power to direct a conveyance (Smalley v. Blackburn Rail. Co., 2 H. & N. 158; 27 L. J., Ex. 65; Johnson v. Wilson, Willes, 248), he should specify the nature of the instrument (Tandy v. Tandy, 9 Dow. 1044; Tipping v. Smith, 2 Stra. 1024), and should direct by whom (that is, which party) and at whose expense it is to be prepared. (Standley v. Hemmington, 6 Taunt. 561.) As property in land will not pass by an award, the arbitrator must direct a conveyance, when the object of the reference is to make any change in the ownership of land. (Johnson v. Wilson, supra.)

Besides the implied power of an arbitrator to give Express power directions as to matters in dispute, an express power is tions. often inserted in submissions. Where the arbitrator " is to determine," or, "shall have power to determine," what he shall think fit to be done, he is not bound to direct affirmatively that something shall be done unless he shall so think fit (Angus v. Redford, 11 M. & W. 69; Morgan v. Smith, 9 M. & W. 427); though it may frequently happen that such a power must be construed as compulsory or the award would be bad as not

being final. (Ross v. Clifton, 9 Dow. 356; Grenfell v. Edgcome, 7 Q. B. 661.)

Directions exceeding the power given.

When authorized to give directions, the arbitrator must take care that they are not in excess of his authority; thus, where an action in which the plaintiff claimed a right of way (not a carriage way) was referred to an arbitrator to direct in what manner the road in question should (if at all) be enjoyed by the plaintiff, and the arbitrator awarded that the plaintiff was entitled to a right of way, including a carriage way, it was held bad as exceeding his authority. (Hooper v. Hooper, M'Cl. & Y. 509.) In Bonner v. Liddell (1 Brod. & Bing. 80), there was an agreement for a lease of a coal mine for sixty-three years from the 1st May, 1801, the lessee to be allowed three years for winning the colliery without payment of rent; and an arbitrator being authorized to give such directions for a lease according to the terms of the agreement as he should think fit, directed a lease of sixty-three years from 1804; it was held that he had exceeded his authority, and consequently that the award was bad. Where a submission empowered the arbitrator to decide how, and by whom, and in what manner, a certain pump, yard, hedge and ditch, respecting which disputes had arisen, should in future be enjoyed and occupied, and who should have the care and management thereof; and the arbitrator, after finding that the pump was the exclusive property of one of the parties, subject to an easement in it by the other, was held not to be authorized to dispose of the property in it to the other, so as to make the two disputants tenants in common. (Boodle v. Davies, 3 A. & E. 200.) But under a power to the arbitrator to decide the right to a certain stream of water claimed in the action, and to regulate the use of it in future, and to order and determine what

he should think fit to be done, it was considered that CHAP. XI. the authority to regulate the flow of the stream in dispute, incidentally and necessarily empowered the arbitrator to affect the enjoyment of other rights of the parties, and to make regulations respecting the flowing of the water in the stream in question, notwithstanding they interfered with the former enjoyment of other streams not the subject of dispute. (Winter v. Lethbridge, 13 Price, 533.)

The arbitrator may (but need not of necessity) ap- Power to order payment by point the time and place of payment of the amount instalments, awarded to be paid by one party to the other; and promissory may award payment by instalments. (Kochill v. Witherell, 2 Keb. 838.) If he order payment at a future day, he may direct the party liable to pay to give a promissory note (Booth v. Garnett, 2 Stra. 1082), or a bond in a penalty, but not with a surety (Cooke v. Whorwood, 2 Saund. 337); and if he direct payment by one of charges for which the other is liable, he may require a bond of indemnity to be given by the former to the latter. (Brown v. Watson, 6 Bing. N. C. 118.)

When an arbitrator finds a sum to be due from the Should direct one party to the other, he should give an express direc-payment of sum found tion for its payment, otherwise the party liable cannot due. be compelled by attachment to do so. (Edgell v. Dallimore, 11 Moore, 541; Hopkins v. Davies, 1 C. M. & R. 846.)

An arbitrator may award one sum generally in re- May award spect of all money claims submitted to him, unless the aggregate sum for distinct submission provide, or there is some legal necessity for claims. his awarding separately—as, for instance, to determine the right to costs. (Rule v. Bryde, 1 Ex. 151; Whitworth v. Hulse, L. R., 1 Eq. 251; 35 L. J., Ex. 149.)

SECT. 3.—An Award must extend to all Matters referred.

Each distinct matter must be decided.

Unless an award extend to all matters submitted to the arbitrator it is entirely void. If several distinct matters are referred, and the arbitrator omit to decide upon any one of such matters, the whole award is vitiated (Randall v. Randall, 7 East, 81; Robson v. Railston, 1 B. & Ad. 723; Hayward v. Phillips, 6 A. & E. 119; Bowes v. Fernie, 4 My. & Cr. 150); thus, for instance, where an action containing two counts, one on a promissory note, the other on an account stated, was referred, an award on the former count, but containing no adjudication on the latter, was held bad (Gisburne v. Hart, 5 M. & W. 50); so where an action of ejectment was referred, and the arbitrator found that the lessor of the plaintiff was entitled to a part of the lands claimed, setting them out by metes and bounds, but said nothing as to the residue, the award was held bad. (Doe v. Horner, 8 A. & E. 235; Wykes v. Shipton, 8 A. & E. 246, n.; Stone v. Phillips, 6 Dow. 247.) And where it was referred to an arbitrator, 1st, to determine all actions between the parties; 2nd, to settle the sum to be paid for articles on certain land; 3rd, to ascertain what rent was to be paid by the plaintiff to the defendant for other land; and the arbitrator made his award on the two first things referred, but took no notice of the rent, the award was set aside. (Randall v. Randall, supra.) where, in a submission under the L. C. C. Act, 1845, the arbitrator was to determine what sum should be paid for the purchase of certain land, and what, if any, sum for severance damage; and he, by his award, after reciting the submission, and that he had considered the

When silence presumed a decision.

matters so referred to him, awarded a sum to be paid for the purchase of the land, without saying anything as to the severance damage, the court held the award good; and that the arbitrator, by his silence, had negatived any right to compensation for severance damage. (Re Duke of Beaufort and the Swansea Harbour Trustees, 29 L. J., C. P. 241.) And the following rule was laid down by Parke, B., in Harrison v. Creswick (13 C. B. 399): "Where there is a further claim made by the plaintiff or a cross demand set up by the defendant, and the award, professing to be made of and concerning the matters referred, is silent respecting such further claim or cross demand, the award amounts to an adjudication that the plaintiff has no such further claim, or that the defendant's cross demand is untenable; but where the matter so set up from its nature requires to be specifically adjudicated upon, mere silence. will not do." (See also Jewell v. Christie, 36 L. J., C. P. 168; L. R., 2 C. P. 296.)

If the arbitrator is to direct how the costs are to be Deciding matpaid, the award will be bad if he omit to direct as to submitted. (Richardson v. Worsley, 5 Ex. 613.) he is to find on any fact, and omit to do so; thus, it being disputed whether A. had been in partnership with B., and if so, whether and when it had been put an end to, an award that if a partnership ever existed it was terminated by consent, was held to be bad as not deciding the question of the existence of the partnership. (Bhear v. Harradine, 7 Ex. 269.) Where a submission authorized the arbitrator to set aside certain deeds, and gave him power to direct what should be done, and he awarded that certain specified deeds should be set aside, "if and so far as the same are in force, and if and so far as I have jurisdiction to set the same aside, and if

I have no jurisdiction to set them or any of them aside, I declare that the rest of my award is yet to stand," was held an inconclusive award. (*Nickels* v. *Hancock*, 7 De G., M. & G. 300.)

Under a submission of a dispute on a building contract, where the arbitrators were to award on alleged defects in the building, on claims for extra work and for omissions, and to ascertain what balance, if any, might be due to the builder, an award ordering a gross sum to be paid to the builder, without any decision on the defects, was held bad. (*Re Rider*, 3 Bing. N. C. 874.)

On a general reference an award presumed final if comprehensive enough to apply to all matters.

Where the submission is of all matters in difference, without specifying them, the arbitrator need only make his award of such matters as he had notice of, for though there be other things in controversy not included in the award, yet, if the arbitrator had no notice of them, his award is good. (Risden v. Inglet, Cro. Eliz. 838; Rees v. Waters, 16 M. & W. 263; Smith v. Johnson, 15 East, 213; Day v. Bonin, 3 Bing. N. C. 219; Duke of Beaufort v. Welch, 10 A. & E. 527.) If, however, he do not make his award of all things within the submission of which he had notice, the award will be void (Mitchell v. Staveley, 16 East, 58; Stone v. Phillips, 6 Dow. 247); and on its being clearly shown that these things were brought before him as matters in dispute (Martin v. Thornton, 4 Esp. 180; Perry v. Mitchell, 14 L. J., Ex. 88; Erskine v. Wallace, 12 W. R. 134; Pinkerton v. Caslon, 2 B. & A. 704; Hancock v. Reid, 21 L. J., Q. B. 78), and that he did not award upon them, the court will set aside the award. (Samuel v. Cooper, 2 A. & E. 752.) But it must appear clearly that the arbitrator did not take such matters into his consideration and include them in

his award. (R. v. St. Katherine Dock Co., 4 B. & Ad.

360; Dunn v. Warlters, 9 M. & W. 293; In re Gillon and The Mersey Navigation Co., 3 B. & Ad. 439.) Whether the award specifically notice every matter in difference or not is immaterial, provided the arbitrator has in fact decided upon all matters in difference submitted to him. (Gray v. Gwennap, 1 B. & A. 106; Hallyar v. Ellis, 6 Bing. 225.) Thus, where a cause and all matters in difference were referred at nisi prius, and the award, purporting to be made "of and concerning the said several premises so referred as aforesaid," awarded to the plaintiff on all the issues, and directed the defendant to pay a certain sum to the plaintiff, but made no mention of other matters in difference, the court held the award to be good, as it sufficiently ap-

peared on the face of it that the arbitrator had decided on all the matters referred to him. (Creswick v. Harrison, 20 L. J., C. P. 56.) So where a cause and all matters were referred, and the arbitrator awarded that on a settlement of all the matters in difference there was due a specified sum from the defendant to the plaintiff, it was held sufficient. (Bradley v. Phelps, 21 L. J., Ex. 310.)

If a power only is given to an arbitrator to award When a power upon any matter, he is not bound to make any award is given. as to that (Angus v. Redford, 11 M. & W. 69); and if he award defectively upon it, the award will not thereby be rendered bad, but the defective part will be rejected. (Nicholls v. Jones, 6 Ex. 373.) It has been held that an agreement that an arbitrator "shall and may" award upon certain matters, is imperative upon him, and that he must. (Crump v. Adney, 1 C. & M. 355.)

It will not save an award, void through omitting to Misapprehendecide some of the matters submitted, that the arbitrator trator. supposed the omitted matters were not in difference, or

not within the scope of the submission. (Samuel v. Cooper, 2 A. & E. 752.) Thus, where all matters in difference were referred, and the arbitrators declined to award concerning a certain claim to an annuity, as they thought they were precluded from so doing by reason of a suit pending in chancery concerning it, the award was declared void. (Bowes v. Fernie, 4 My. & Cr. 150; and see Turner v. Turner, 3 Russ. 494.)

Deciding between all the parties. The award will be bad if it omit to adjudicate between all the parties to the reference. (Winter v. White, 2 Moore, 723.) Thus, where three persons, A., B. and C. on one side, and D. on the other, submit all differences and disputes between them to arbitration, an award relating to disputes between A. and B. only of one part, and D. of the other, is bad for omitting to decide between C. and D. (Harris v. Paynter, Rolle, Ab. "Arb." O. 8.)

## SECT. 4.—An Award must be certain.

An award to be binding must be certain, that the parties may be able to gather from it clearly what they have to perform, and that the court may see that the arbitrator has not exceeded his authority. It must be certain, both as to the finding itself and as to the things ordered to be done.

When an award will be held certain.

The courts will strive to hold an award to be certain, and will not presume it to be uncertain. The uncertainty must expressly appear on the face of the award or by averment. It will be sufficient if it is certain to a common intent, that is, if it show such a certainty as was contemplated by the parties in the submission (Hawkins v. Colclough, 1 Burr. 275); and if, on a fair and reasonable interpretation of the terms employed, a man of common understanding can comprehend the

meaning and intention of the arbitrator. (Cargey v. Chap. XL Aitcheson, 3 D. & R. 433.)

If by manifest implication that appear which, if positively expressed, would render the award good, that is sufficient to support it. (Linnem v. Williamson, Rolle, Ab. "Arb." R. 16.)

A reasonable degree of precision in the terms of the Reasonable award is all that is required; thus, a direction to a ficient. mortgagee to reassign mortgaged lands will be sufficient, though the period for which the reassignment is to be is not named, the courts presuming that the whole interest mortgaged is intended (Rosse v. Hodges, 1 Ld. Raym. 233); and a direction that a nuisance on the defendant's soil is to be removed, without saying by whom, has been held certain, as the courts will presume that the owner of the soil is the person intended. (Armitt v. Breame, 2 Ld. Raym. 1076.) Where an arbitrator had power to settle at what price the defendant should purchase the plaintiff's "property," and the arbitrator fixed a certain price at which the defendant should purchase the plaintiff's "said property," it was held that this was sufficiently certain, as the property was not a matter in difference. (Round v. Hatton, 10 M. & W. 660; and see Johnson v. Latham, 20 L. J., Q. B. 236.) On the same principle, where an action of debt on a money bond, to which the only plea was payment by a co-obligor, was referred, and the arbitrator ordered a verdict to be entered for the plaintiff, without stating what amount was due on the bond, the award was held (Cayme v. Watts, 3 D. & R. 224.) From the above cases it may be drawn that an arbitrator fulfils his task if he decide the very matters submitted and about which the parties differ; what the parties treat as certain and ascertained, he may assume to be

and deal with as such; and though the award might to a stranger be ambiguous or uncertain, it will be valid if it determine such matters as it could have been fairly intended by the submission that he should decide. (See *Perry* v. *Mitchell*, 2 D. & L. 452.)

But reasonable precision is requisite.

But there must be a reasonable precision, and an award is void for uncertainty that orders one party to pay so much money as is due in conscience (Watson v. Watson, Sty. 28), or to pay "certain task and days' work" (Pope v. Brett, 2 Saund. 292), or to pay so much as certain land is worth (Titus v. Perkins, Skin. 247), or to pay the moiety of a certain debt for which A. is bound (Gray v. Gray, Rolle, Ab. "Arb." Q. 2), without in each case stating the amount; or to pay arrears of rent without stating from when payable. (Massy v. Aubry, Sty. 305.) So also is an award that the defendant shall deliver up certain goods particularly named, and three boxes, and several books, without naming the books (Cockson v. Ogle, Lut. 550); or that a "certain writing obligatory" shall be delivered, without describing it (Bedam v. Clerkson, 1 Ld. Raym. 124); or that one party shall give security for money, without specifying the nature of the security (Duport v. Wildgoose, 2 Bulstr. 260; Thinne v. Rigby, Cro. Jac. 314); or that A. shall pay whatever sum B. shall be compelled to pay in respect to a certain bill of exchange. (Graham v. D'Arcy, 6 D. & L. 385; 18 L. J., C. P. 61.)

And there must be certainty in regard to all matters included in the reference about which there is any difference, and in regard to which no presumption would by necessary intendment otherwise arise to fix them with certainty. Where arbitrators were, in a certain event, to order payment in reduction of a mortgage debt, they

ordered payment of the mortgage debt but did not find the amount, which was a matter to be decided by them, the award was held bad. (Hewitt v. Hewitt, 1 Q. B. 110; see also Re Marshall and Dresser, 3 Q. B. 878.)

If it is doubtful whether the award has decided the Award bad matter referred (Re Tribe and Upperton, 3 A. & E. doubt how it 295), or it does not clearly appear how it decides it, it decides matters. An award that a certain will be set aside as uncertain. amount is due to the defendant from A., B. and C., some or one of them, and directing the amount to be paid by them, some or one of them, is uncertain. (Rainforth v. Hamer, 25 L. T. 247.) Where an action of assumpsit and all matters in difference were referred at nisi prius, with power to the arbitrator to direct a verdict to be entered for either party, and the arbitrator directed a verdict to be entered for the plaintiff, without saying for what amount: the court held the award bad for uncertainty, although it also awarded that the defendant was indebted to the plaintiff in 2601.; because that sum might have been due with respect to the matters in difference, and not in the (Martin v. Burge, 6 N. & M. 201.)

In an action against an executor, where the arbitrator found a certain sum due to the plaintiff on the balance of accounts, and awarded that the defendant should pay it out of assets on a given day, it was held to be sufficiently certain without stating expressly that defendant had assets to that amount. (Love v. Honeybourne, 4 D. & R. 814.)

An award, on a reference of cause and all matters in difference, that "nothing is due to the plaintiff," was held sufficiently certain (Dickins v. Jarvis, 5 B. & C. 528); so, in a similar case, was an award that "the plaintiff has no cause of action." (Hayllar v. Ellis, 6

Bing. 225; 3 M. & P. 553.) But an award that the defendant had overpaid the plaintiff a specified sum, was held insufficient. (*Thornton* v. *Hornby*, 1 M. & S. 48.)

Finding facts to raise a question of law.

Where an arbitrator finds facts to raise a question of law, he should find them with such certainty that the court may draw their conclusion of law, and he should not leave any fact to be intended by the court. (Watson on Awards, 209.)

Uncertainty not voiding an award when it can be rendered certain.

A primâ facie uncertainty or want of conclusiveness in an award does not vitiate it, if it be capable of being rendered certain or conclusive,—the maxim id certum est quod certum reddi potest applying in such cases,and the award may be bad or good according to the event. (Cargey v. Aitcheson, 2 B. & C. 170.) Thus, where a specified sum of money was ordered to be paid within a certain time from the date of the award, and the award bore no date, it was held sufficiently certain, as the time would be computed from the delivery of the award. (Armitt v. Breame, 2 Ld. Raym. 1076.) where a bond was ordered to be delivered up to be cancelled within a certain time from the date of it, without stating the date, it was considered sufficient. (Bell v. Gipps, 2 Ld. Raym. 1141.) In Boyes v. Bluck (13 C. B. 652), an award that A. should "forthwith" execute conveyances to C., and that C. should "forthwith" execute releases to A., was upheld, as the latter forthwith was to be construed to mean as soon as the former direction had been obeyed. And a direction to pay money or execute a release is sufficiently certain though it mention no time, for it must be performed within a reasonable time. (Freeman v. Bernard, 1 Salk. 69.) An award that one party to a reference relating to a voyage should pay his share of the expenses of the

voyage, and allow on account his proportion of the loss CHAP. XI. which should happen to the ship during the voyage, was good, as both expenses and loss might be reduced to a certainty. (Beale v. Beale, Rolle, Ab. "Arb." H. 14.) So an award that two persons should pay a debt in proportion to the shares which they held in a ship (Wohlenberg v. Lageman, 6 Taunt. 254), and a direction for payment of "interest since last settlement of accounts" (Plummer v. Lee, 2 M. & W. 495; 5 Dow. 755), are sufficiently certain. And an award was held certain that directed one party to pay to the other all such monies as he had expended about the prosecution of a suit, for that might be ascertained by showing in fact what had been laid out. (Hanson v. Leversedge, 2 Vent. 242; Fox v. Smith, 2 Wils. 267.) But a direction to pay all reasonable expenses which the plaintiff has sustained about a suit (Bargrave v. Atkins, 3 Lev. 413), or to pay the charges spent in making an award (Pinkey v. Bullock, 3 Lev. 413), is void for uncertainty.

In a reference of a cause, either alone or with other Awarding matters, an award of costs or any specified proportion ascertaining thereof, though the amount is not ascertained, is sufficiently them, when certain. ciently certain, and in such a case the master or other officer of the court shall tax them (Cargey v. Aitcheson, 2 B. & C. 170; Fox v. Smith, 2 Wils. 267; Holdsworth v. Barsham, 31 L. J., Q. B. 145; in error, 32 L. J., Q. B. 289; Holdsworth v. Wilson, 4 B. & S. 1.) This, however, only applies to causes in the superior courts, and the arbitrator should himself assess the costs in an action in an inferior court, otherwise there is an uncertainty in the award, there being no proper officer in such court to tax them. (Winter v. Garlick, 1 Salk. 75; Addison v. Gray, 2 Wils. 293.)

If the arbitrator, without specifying definitely the amount of costs, gives the rule for computing them, the award is sufficiently certain. (*Higgins* v. *Willes*, 3 M. & Ry. 382; *Platt* v. *Hall*, 2 M. & W. 391.)

Where the reference is by an agreement which may be made a rule of one of the superior courts, the costs of the reference may on application be taxed by the officer of the court, and in such cases it is no objection that the amount is not ascertained by the arbitrator. (Thorp v. Cole, 2 C. M. & R. 367; 4 Dow. 457.) A direction to the one party to pay costs is sufficient without saying to whom, for the other party will be intended. (Baily v. Curling, 20 L. J., Q. B. 235.)

Award giving the rule for ascertaining the money to be paid, good.

If in awarding a payment of money the arbitrator instead of naming the amount indicate the manner in which it is to be estimated, it will be good; but the manner must be precisely pointed out, for an award between A. and B. concerning certain quarters of malt delivered by A. to B., that B. should pay to A. so much for each quarter of malt as a quarter of malt was then sold for, was held bad, because no mention was made of any market or place where the price was to be estimated. (Hurst v. Bainbridge, Rolle, Ab. "Arb." Q. 7.) This decision is not affected by Waddle v. Downman (12 M. & W. 562), for there the arbitrator had only to decide whether or not the plaintiff was to be allowed the value of certain articles at the market price of pig iron, and as he decided affirmatively that was such a certainty as the parties may fairly be considered to have contemplated, without his naming the market.

Intention of the arbitrator to be regarded.

The court will look to the evident or necessary intention of the arbitrator in deciding upon the certainty of an award, thus where an action of ejectment was referred, and the arbitrator, after reciting the submission, awarded thus, "I award and determine that the verdict in the \_CHAP. XI. said cause be entered for the lessors of the plaintiff,"instead of for the plaintiff, the court held that the arbitrator must be understood to have finally determined the cause in favour of the plaintiff. (Law v. Blackburrow, 23 L. J., C. P. 28; 14 C. B. 77; Mays v. Cannel, 24 L. J., C. P. 41; 15 C. B. 107.)

An award that one of two persons shall do an act is Award in the void for uncertainty (Lawrence v. Hodgson, 1 Y. & alternative, or conditional. J. 16), but an award that a person shall do one of two things is not uncertain if either thing is capable of being performed. (Lee v. Elkins, 12 Mod. 585; Simmonds v. Swaine, 1 Taunt. 549; Oldfield and Wilmer's Case, 1 Leon. 140.) And an award conditional upon the performance or non-performance of a certain act is not uncertain: thus an award that one party should pay the other 20s. on condition that each should acquit the other (Linfield v. Ferne, 3 Lev. 18); and that A. should pay 1051. on a certain day, and, if he did not, that he should pay 1101. on a certain other day (Rolle, Ab. "Arb." H. 8), have been held good.

If the award direct any acts to be done, the directions Directions must be clear and specific, that they may be strictly must be specific. obeyed; therefore an award that a party should put up certain gates, without defining their value or description, (Price v. Popkin, 10 A. & E. 139.) And where in a reference of an action for polluting a watercourse, the arbitrator was to direct how the water should be enjoyed in future, and he awarded that the defendant should take all reasonable precautions to prevent the water from being rendered less fit for use by his business of dyer, and that all refuse water from the defendant's works should, at the defendant's expense, be passed through filters, so as to be thereby effectually

cleansed, so far as the same could be cleansed by the ordinary and most approved process of filtering, this was held to be uncertain for not specifying what particular precautions should be employed. (Stonehewer v. Farrar, 14 L. J., Q. B. 122; 6 Q. B. 730; and see Sharpe v. Hancock, 7 M. & G. 354.) An arbitrator who had to direct the apportionment of a trust estate amongst the persons entitled, after finding a certain sum due from a party, directed him to pay or account for it to the trust estate; his award was held uncertain in not specifying to whom and in what proportions the money ought to be paid. (In re Tidswell, 33 Beav. 213.) And an award which, in directing the enjoyment of land in the future, directed that the parties should enjoy it as heretofore, was held to be uncertain. (Ross v. Clifton, 9 Dow. 356.) But an award that recited that the parties were joint tenants of certain lands, and ordered that they should make partition by mutual conveyance, was held good, though it did not specify what moiety or part the one should have, and what the other. (Knight v. Burton, 6 Mod. 231.)

# SECT. 5.—An Award must be final.

Award must be final.

An award must finally determine all matters contained in the submission requiring decision, and if it leave the final decision of some of the matters to be ascertained in the future it will not be binding on the parties. But where differences having arisen between two railway companies, proprietors of joining lines, as to the interchange and transmission of traffic, it was, under the provisions of a special act, referred to arbitrators to determine what arrangements should be made

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by the two companies or either of them for affording proper facilities for such interchange and transmission, and the arbitrators made their award giving specific directions as to future traffic arrangements, but no directions as to the length of time for which such arrangements were to last, it was held not to be thereby defective, as they would continue until new arrangements were made under the arbitration clause in the said act. (The Eastern Union Rail. Co. v. The Eastern Counties Rail. Co., 22 L. J., Q. B. 371; 2 E. & B. 530.) And an arbitrator having to decide upon the depth at which the defendant was entitled to keep a weir, awarded that the defendant was entitled to maintain his weir to the depth of fourteen inches and no more, and added that he had caused marks to be placed, which marks pointed out the depth the defendant was to keep his weir; it was held that the award sufficiently pointed out the depth of the weir, and was sufficiently precise, although it made no provision for the case of floods, or for regulating the depth of the paddle in the defendant's weir by which the water could be let off. (Johnson v. Latham, 20 L. J., Q. B. 236; 2 L. M. & P. 205.) Where two parties agreed to be bound by the opinion of a professional man upon the construction of an act of parliament, and he gave his opinion in favour of one; such opinion was considered final and conclusive though it recommended the printed statute to be compared with the parliament roll before the matter was settled, under a doubt whether the statute was not misprinted. (Price v. Hollis, 1 M. & S. 105.)

If the award be as final as the nature of the thing will admit it is sufficient. (*Phillips* v. *Knightly*, 2 Stra. 903.) So if it award the very thing that the

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parties have agreed shall be done. (Miller v. De Burgh, 19 L. J., Ex. 127.)

Arbitrator can make but one award, unless empowered by the submission to make several,

An award must be one entire instrument or direction. for an arbitrator can make but one award even within the time limited for his award, unless by express or implied authorization in the submission. Thus, where by an order of reference a cause and all matters in difference between A. and B. were referred, and by a subsequent order, made after the first reference had commenced, it was directed that C. should be made a party thereto as if he had been an original party, and that a cause between A. and C. and all matters in difference between A., B. and C., each and every of them, jointly and severally, should be referred to the same arbitrator: and the arbitrator made two awards. in one of which he awarded that A. was indebted to B. without mentioning C., and in the other, that A. was indebted to C. without mentioning B.; it was held that both awards were bad, and that the arbitrator had not properly performed his duty as there was no one award determining all matters in difference between all the (Winter v. White, 2 Moore, 723.) parties. where a general verdict was taken for the plaintiff on all the issues in an action, subject to a reference of that and another cross action between the same parties in which issue had not been joined, with power to the arbitrator to make an award or certificate, and the arbitrator delivered two papers containing two certificates; it was held that it might be intended that both were made at the same time, and if so, they would be one instrument containing the decision of each cause written on separate papers for the purpose of being applied to the separate causes. (Smith v. Reece, 6 D. & L. 520.)

If empowered by the submission the arbitrator may make several awards. (Dowse v. Coxe, 3 Bing. 20; Wrightson v. Bywater, 3 M. & W. 199.) Arbitrators in a reference under the Railway Companies Arbitration Act, 1859, may make several awards, each on part of the matters referred. (22 & 23 Vict. c. 59, s. 21.)

We have seen (ante, sect. 3) that where several matters are referred and some only are decided the award is bad, and it is bad because it is not a final settlement of the matters in difference between the parties. (Samuel v. Cooper, 4 N. & M. 520; Ross v. Boards, 8 A. & E. 291.)

An award leaving the result conditional upon the Awarding a voluntary performance of an act by the one party is voluntary performance is generally bad. (Crofts v. Harris, Carth. 187.) Thus bad. an award that if A. give up his shares B. shall pay him a certain sum is bad; it should be that A. shall give up his shares, and that B. shall pay the sum (Baillie v. Edinburgh Gas Co., 3 C. & F. 639); and a direction that the plaintiff should accept a bill of sale, was held bad because it did not direct the defendant to give the bill of sale. (Clapcott v. Davy, 1 Ld. Raym. 611.) But an award of a lease of certain premises to the defendant, and providing that if the rent awarded to be paid by him were not paid the award should be void, was held good, on the ground that the conditional award became absolute if the defendant paid the rent, and if he did not he lost the enjoyment by his own default. (Furser v. Prowd, Cro. Jac. 423.)

An award containing a proviso that upon the happen- Proviso voiding of a subsequent event (whether the event is within is bad. the control of the parties or not), the award shall be wholly void, is bad as not being final (Kinge v. Finis, Sid. 59); thus a proviso that if either party were dis-

satisfied with the award and within a specified time paid a small sum to the other the award should be void and the parties be at liberty to proceed against each other as before the award, was held not final. (Sherry v. Richardson, Pop. 15.)

An award to be altered by subsequent proof. Where the award is to be altered by the subsequent oath or proof of one of the parties, this vitiates the whole award; thus an award, that if the plaintiff on account prove certain articles against the defendant, then he shall pay so much money as the plaintiff was damnified thereby, is not final. (Selby v. Russell, Comb. 456.) So an award depending on something to be subsequently ascertained, is bad: thus an award that a certain sum should be paid in lieu of tithes, provided the whole lands were subject to tithes; but if only subject to tithes according to a specified terrier, then a different sum; was held void. (Goode v. Waters, 20 L. J., Ch. 72.)

Delegation or reservation of authority.

Any delegation or reservation of their authority by arbitrators will vitiate their award, for an award would not be final that left anything to the future judgment or power of the arbitrators or of any other person; thus a direction to leave so many trees on land, for housebote and hedge-bote, as the arbitrator upon advice with counsel shall appoint (Thinne v. Rigby, Cro. Jac. 314); or a proviso that the doing of a certain act awarded shall depend upon the after-given consent of the arbitrator (Lindsay v. Lindsay, 11 Ir. C. L. Rep. 311), is So an award that as to the whole or part of the matters submitted the parties shall abide by the decision of a third person. (Lower v. Lower, Rolle, Ab. "Arb." H. 11; Johnson v. Latham, 19 L. J., Q. B. 320.) An award that the defendant should pay to the plaintiff a certain sum, unless he should within twenty-one days exonerate himself by affidavit from certain payments

and receipts, and in that case he was to pay a less sum, was held to be bad, as it left the sum to be decided by the defendant himself. (Pedley v. Goddard, 7 T. R. 73.) So an award that A. should pay B. 501., and beg his pardon at such time and place as B. should appoint, was void for delegating the appointment of time and place to B. (Glover v. Barrie, 1 Salk. 71.)

An arbitrator, when he awards a conveyance to be executed, need not draw it himself, but he should indicate the form of it and not leave that in the discretion of the draftsman employed; thus an award ordering certain parties to execute such conveyances, releases and assurances as should be necessary to pass their interest, and not stating the form of conveyance, but providing that if any dispute should arise as to the form, it should be decided by such counsel or attorney as the arbitrator should appoint, was void. (Tandy v. Tandy, 9 Dow. 1044; Goddard v. Mansfield, 19 L. J., Q. B. 305.)

Any proviso in an award by which an arbitrator professes to reserve to himself power over future differences, is void. (Manser v. Heaver, 3 B. & Ad. 295.)

Where part of the matter in dispute is reserved for Reserving or future litigation the award is not final. (Turner v. excepting Turner, 3 Russ. 494.) And where, on a reference arising out of a dissolution of partnership, the arbitrator directed that a matter arising as to a liability on a promissory note should not be affected by the award, the award was held bad. (Wilkinson v. Page, 1 Hare, 276.) But where a cause and all matters in difference were referred, and the arbitrator awarded as to all, except a certain claim by the plaintiff for a loss on hats, and as to that he found that no sufficient evidence was laid before him to show that any loss had been sustained at the date of the reference, this was held sufficiently

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final. (Cockburn v. Newton, 2 M. & G. 899.) In a similar case the award, after deciding that the plaintiff had no cause of action, stated that it was not intended to exclude him from the receipt of a certain commission to which he would subsequently become entitled under an agreement; the court held it sufficient, as it in fact determined that there was nothing due on the agreement at present, and the arbitrator was only empowered to decide on matters up to the date of the submission. (Harding v. Forshaw, 1 M. & W. 415.)

Sect. 6.—An award must not be impossible, unreasonable, inconsistent, or illegal.

An award bad as impossible.

An award that one of the parties shall do an act out of his power is bad; as that one party shall deliver up a deed which is in the custody of another (Lee v. Elkins, 12 Mod. 585); or that he shall procure a stranger to be bound with him as a surety. (Thursby v. Helbot, 3 Mod. 272.) But it is no objection to the award that it is difficult for the party to perform it, from the accidental narrowness of his circumstances, as if he be to pay 201. when he has no property. And an award of an impossible act, with a possible alternative, is good. (Wharton v. King, 2 B. & Ad. 528.) If an act awarded is possible at the time of the award, the party is bound by the award though the act afterwards becomes impossible by the conduct of himself or a stranger. (Com. Dig. "Arb." E. 12.)

Award unreasonable. An award must be reasonable. Instances of unreasonable awards are furnished in the old cases. Thus an award that one party shall give a horse or release his

right to certain land in satisfaction of a trespass, or erect a stile on the land of another is so unreasonable as not to be binding upon the party. (Ross v. Boards, 3 N. & P. 382.) So an award that one shall serve the other two years in satisfaction of an action (Rolle, Ab. "Arb." B. 12), or pay the other 3001. to repair his honour for calling him a bankrupt knave. (3 Rep. in Ch. 76.)

If one part of an award be inconsistent with the Contradictory. other it will be bad, as where an arbitrator awarded that A. should pay B. 100%. and that both should give general releases, and that at a subsequent time B. should pay A. 201., the award was held bad. (Storke v. De Smeth, Willes, 66; Ames v. Milward, 8 Taunt. 637.) But an award that the defendant should pay to the plaintiff 50l. towards the costs of the cause and reference, and that the plaintiff should pay his own and the defendant's costs of the same, has been held not to be inconsistent. (Seckham v. Babb, 8 Dow. 167; 6 M. & W. 129.) And where a cause and all matters in difference were referred, costs to abide the event, and the arbitrator found several of the issues inconsistently, the court held the award good, regarding all the findings after the first as hypothetical and only for the purpose of distributing the costs. (Duke of Beaufort v. Welch, 10 A. & E. 527.) In a reference of an action of debt the pleas of nunquam indebitatus and payment may both be consistently found for the defendant, for if on a trial the plaintiff had failed in proof of his case, and the defendant proved payment, the verdict would be entered for the defendant on both issues. (Maloney v. Stockley, 2 Dow. N. S. 122; 4 M. & G. 647; and see Cooper v. Langdon, 9 M. & W. 60; 10 M. & W. 785.)

In an action of trespass referred by order of nisi prius, to which the defendant pleaded not guilty and secondly a justification; the arbitrator (who was a layman) awarded "that as the defendant had not proved his plea the verdict ought to stand," and then added a number of reasons which could not be considered satisfactory, the court held the adjudication sufficient and declined to consider the sufficiency of the reasons assigned by the arbitrator. (Archer v. Owen, 9 Dow. 341.)

Illegal.

If an arbitrator direct an act to be done which is contrary to the law, the award is so far bad. (Alder v. Savill, 8 Taunt. 454; Turner v. Swainson, 1 M. & W. 572.) Thus an award directing a party to commit waste or a trespass, or to do an act amounting to a crime, is bad. But it seems that if the doing of an act is against some rule of practice merely it is not bad. (Re Badger, 2 B. & A. 691.) If a sum of money be awarded to be paid on or before a certain day which happens to be on a Sunday, the award is not bad. (Hobdell v. Miller, 2 Scott, N. R. 163.) If a sum awarded appear on the face of it to have arisen out of some illegal transaction the award will be bad pro tanto. (Aubert v. Maze, 2 B. & P. 371; and see Steers v. Lashley, 6 T. R. 61.) And it has been held that the illegality must be apparent on the face of an award. (Cramp v. Symonds, 1 Bing. 104.)

Where an award recited a clause in the submission which provided that documents should be admitted in evidence without a stamp, but it did not appear that the arbitrator had admitted any unstamped documents, the award was held good. (*Phillips v. Higgins*, 20 L. J., Q. B. 357.)

Mutuality in an award.

Formerly great stress was laid upon the necessity of

mutuality in an award, but the decisions on this point CHAP. XI. have long ceased to have any practical value, for it is difficult to conceive any case in which an award extending to all matters submitted, and not exceeding the submission, would be set aside on the ground of want of mutuality.

## SECT. 7.—Award bad in part.

An award may be good in part and bad in part Award bad in when the subject is clearly capable of being separated; part may be and that part which is good may be enforced, provided residue, if all matters well it be in itself a final determination of all matters sub-decided, mitted and perfectly distinct from and independent of that part which is bad (Candler v. Fuller, Willes, 64; Auriol v. Smith, 1 Turn. & Russ. 121; Addison v. Gray, 2 Wils. 293; Ingram v. Milnes, 8 East, 445; Stone v. Phillips, 6 Dow. 247; Kendrick v. Davies, 5 Dow. 693); and the faulty direction will be set aside or treated as null.

An award directing the defendant to remove certain and the faulty hatches part of which belonged to him absolutely, but parable from in other parts of which he had only a share; at the same time providing that the award should affect the latter only so far as his interest extended, was held good as to all but that part in which the defendant might show his inability to proceed. (Doddington v. Bailward, 7 Dow. 640.) Where an action as to the right to the enjoyment of a watercourse was referred with all matters in difference, and the arbitrator gave some directions respecting the enjoyment of the watercourse beyond the submission, the court held the award to be bad quoad that part only, but good for the rest (Winter

v. Lethbridge, 13 Price, 533); and so where the arbitrator exceeded his authority by directing future repairs. (Johnstone v. Cheape, 5 Dow. 247.) An arbitrator to whom a cause and all matters in difference were referred directed a verdict to be entered for the plaintiff and certain works to be done by the defendant: he then added that as disputes might arise respecting the performance of the award, the plaintiff, if dissatisfied with it, might (on giving notice to the defendant) bring evidence before the arbitrator on the insufficiency of the work, and the defendant might also give evidence on his part in order that a final award might be made concerning the matters in difference; but if no proceedings were taken by the plaintiff within two months after the work was done, the award then made should be final, and he enlarged the time for making his final award for six months; it was held that the reservation of future power by the arbitrator was bad, but that the former part of the award was final and binding. (Manser v. Heaver, 3 B. & Ad. 295.)

If an arbitrator have no power over costs, and he assumes in his award to give directions as to costs, such directions do not vitiate the award, but will be rejected and the other portions enforced. (Aitcheson v. Cargey, 13 Price, 639; 2 Bing. 199; Kendrick v. Davies, 5 Dow. 693; Wilson v. Doolan, 5 Ir. Jur. 136.)

An award of a release up to the time of the award is void only as to the time between the submission and the award. (Cooper v. Pierce, 1 Ld. Raym. 116; Pickering v. Watson, 2 W. Bl. 1117.) If the arbitrator award mutual releases on payment of a sum over which he has jurisdiction, and also of a sum over which he has none, the award is good as to the former. (Kendrick v. Davies, supra.) And if an award be bad as to the

direction of mutual releases where they are awarded, that will not vitiate the whole. (Doe d. Williams v. Richardson, 8 Taunt. 697.)

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Where an arbitrator having power, but not being bound by the terms of the submission to give directions as to a particular matter, gives a direction which is invalid, the whole award is not thereby vitiated, but the invalid direction may be treated as surplusage. (Nicholls v. Jones, 20 L. J., Ex. 275.) And where an arbitrator without authority ordered a verdict to be entered, but the award disposed of all matters referred independently of the verdict, that part of the award was rejected and the rest held good. (Price v. Popkin, 2 P. & D. 304; Doe d. Body v. Cox, 15 L. J., Q. B. 317.) In like manner when the arbitrator, having found on all the issues, awarded a stet processus, having no authority to do so, this part of the award was held separable from the rest. (Ward v. Hall, 9 Dow. 610.)

A distinction prevails between an award of several If the bad things and of one entire act or thing. Where one able the whole entire thing is awarded which is not in its nature di-void. visible it cannot be apportioned so as to reject a faulty and support a good part thereof, but the whole will be As where one entire sum is awarded to be paid, the courts cannot enter into the question what part of the sum is and what is not within the submission; but if the arbitrator has exceeded his authority in awarding any part of an entire sum, the award cannot be enforced at all. (Auriol v. Smith, 1 Turn. & Russ. 121.) Where an arbitrator to whom before issue a cause was referred, awarded thus, "I award and direct that a verdict in this cause be finally entered for the plaintiffs with 2481. 12s. damages," the court held that he had exceeded his authority in awarding the entry of

a verdict, and as the award consisted only of one sentence, that direction could not be rejected and the residue considered as an award that so much was due and to be paid, and that, therefore, the award was bad. (Jackson v. Clarke, M'Cl. & Y. 209.) And the same where an arbitrator found an indivisible plea partly for the defendant. (Moore v. Butlin, 2 N. & P. 436.)

Where an arbitrator has exceeded his power by awarding costs to be taxed as between attorney and client, if that part of the award be separable from the rest it may be rejected, and the award stand; but if it be so connected with the rest as not to be separable, the whole will be vitiated. (Seckham v. Babb, 8 Dow. 167; 6 M. & W. 129.)

Wherever the void part of an award is the consideration or recompense of the thing awarded on the other side, the award is entirely void: as where it was awarded that A. should pay to B. 251.; and that B. should pay to A. for certain task work and day work; and that the parties should give each other a general release; this award was held to be entirely void, for the uncertainty of the sum to be paid for task work, which formed a consideration for the money to be paid on the other side. (Pope v. Brett, 2 Saund. 292.) So, wherever there is a good award standing alone, but in a subsequent part there is a reservation or delegation by the arbitrator of his authority, which runs over the whole award, this latter part vitiates the whole award. (Storke v. De Smeth, Willes, 69; Pedley v. Goddard, 7 T. R. 73.) Thus, where an arbitrator awarded that certain suits should cease, and awarded three several sums to be paid by A. to B. on three several days, and if before the last day of payment it should appear to the arbitrator that B. was engaged for A. in a debt not

satisfied, then B. should repay to him so much as the CHAP. XI. debt not satisfied amounted to, and that the parties should execute mutual releases; the court held that this reservation of power affected the whole award and rendered it wholly void. (Winch v. Saunders, Cro. Jac. So an award will be void if the decision of matters beyond his authority has affected the arbitrator's decision as to matters within his authority. (Re Marshall and Dresser, 3 Q. B. 878.)

#### CHAPTER XII.

#### AWARDING ON A CAUSE.

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Where a cause is referred the pleadings need not be set out in the award. (Johnson v. Latham, 20 L. J., Q. B. 236.) It is not necessary that the arbitrator should find for the plaintiff or defendant in the words of the issue; it is sufficient if he decide substantially the question in dispute. (Wykes v. Shipton, 3 N. & M. 240.) On the other hand it is sufficient if he find in the words of the issue (and this is the best and most proper way); he need not find in express terms for the plaintiff or defendant. (Allen v. Lowe, 4 Q. B. 66; Stonehewer v. Farrar, 6 Q. B. 730.)

Unless the terms of the submission empower him to do so, an arbitrator may not dispose of a cause without showing in whose favour it is decided. As a general rule where a cause in which there are several issues is referred at nisi prius, the arbitrator should, if requested, direct how each issue is to be determined. (Woolfe v. Hooper, 6 Scott, 281; 4 Bing. N. C. 449; Williams v. Moulsdale, 7 M. & W. 134.)

When costs abide the event, arbitrator must find on each issue. Where there are several issues and the costs of the cause are to abide the event, the arbitrator should find upon each issue so as to enable the officer of the court to tax the costs for the party in whose favour each issue has been found. (Kilburn v. Kilburn, 13 M. & W. 671; 2 D. & L. 33; Brooks v. Parsons, 1 D. & L. 691; Bourke v. Lloyd, 10 M. & W. 550; Doe d.

Starling v. Hillen, 2 Dow. N. S. 694; Pearson v. Archbold, 11 M. & W. 477; Lewis v. Curlewis, 1 B. C. Rep. 161.) And he should so find though not expressly requested to do so by the parties (England v. Davison, 9 Dow. 1052), and whether he has an award or only a certificate to make. (Brooks v. Parsons, supra.) And he may not order a stet processus, for then, as there is no decision in favour of either party, there is no legal event of the cause on which the costs can be taxed. (Hunt v. Hunt, 5 Dow. 442; Norris v. Daniel, 10 Bing. 507.) But if he award on all the issues, and then direct a stet processus, the latter direction will be void as an excess of authority, but will not vitiate the award. (Ward v. Hall, 9 Dow. 610.) If, however, the parties agree among themselves, that to avoid finding upon each issue the arbitrator may, if he think there was no ground of action against the defendant, award a verdict for the defendant on all the issues, such an award will be good. (Waddle v. Downman, 12 M. & W. 562.) And where a verdict is taken subject to a reference to an arbitrator who is to award on some specified matters only, he need not find on the issues, or do more than decide on the particular ques-(Sowdon v. Mills, 30 L. J., Q. B. 175.)

It is not however necessary for the arbitrator to find Specific specifically upon each issue; if it can be clearly inferred finding not necessary. from the award in which way each of the issues has been found it is sufficient. (Humphrey  $\forall$ . Pearce, 22 L. J., Ex. 120; Wilcox v. Wilcox, 4 Ex. 500; Hobson v. Stewart, 4 D. & L. 589; Stonehewer v. Farrar, 6 Q. B. 730; Phillips v. Higgins, 20 L. J., Q. B. 357; Williamson v. Locke, 2 D. & L. 782; Armitage v. Coates, 4 Ex. 641; Baker v. Cotterill, 18 L. J., Q. B. 345; 7 D. & L. 20.) Though the older cases (see

Brooks v. Parsons, 1 D. & L. 691) lay down the rule that each issue must have been specifically decided, the recent decisions of the courts have established the more lax rule above stated. In Humphrey v. Pearce (supra), Martin, B., said: "The case of Brooks v. Parsons may now be considered as overruled by no less than three decisions; first there is Wilcox v. Wilcox, which recognizes and adopts the principle of the decision of Erle, J., in Hobson v. Stewart; and there is the case of Phillips v. Higgins, in which my brother Wightman expressed his opinion, that when there is a reference of a cause only, the award is good notwithstanding there is no specific finding on each issue, if it appear by reasonable intendment that all the issues have been determined in favour of the plaintiff. I am glad that the cases have been so decided, for it is plain that when an arbitrator awards that a plaintiff is entitled to a certain sum the meaning is that he is so entitled upon all the issues joined in the cause."

Where to a declaration consisting of three indebitatus counts there were pleas of non assumpsit, tender, set-off and payment, upon which issues were joined; the cause having been referred at nisi prius, the costs of the cause to abide the event of the award, the arbitrator found for the plaintiff on the first, third and last issues, and for the defendant on the second issue; it was held that this was a sufficient finding; and that it was not necessary there should be a distinct finding on all the sub-issues raised by the plea of non assumpsit upon each separate count in the declaration. (Adam v. Rowe, 15 L. J., Q. B. 223; 3 D. & L. 331.) So where an action in which the declaration contained three counts, to which the defendant had pleaded not guilty, and to each of the counts various special pleas which went to

the whole cause of action, was referred with all matters in dispute, the costs of the action and of the reference and award to abide the event; the arbitrator awarded that the plaintiff had good cause of action in respect of the second count, and was entitled to recover a certain sum for damages on that count, but that he had no cause of action in respect of the first and third counts; the award was held good. (Williamson v. Locke, 2 D. & L. 782; but see England v. Davison, 9 Dow. 1052.) But where to a declaration containing a single count for board and lodging and upon several other claims, the defendant pleaded never indebted and a setoff, and the cause was referred, the costs to abide the event of the award; the arbitrator certified that a verdict should be entered on the first issue for the plaintiffs and on the second issue for the defendant; he afterwards stated that he considered the claim for board and lodging was the only one the plaintiff had made out: the court, on motion by the defendant, referred the matter back to the arbitrator to enable him, if he thought fit, to find separately as to the different items contained in the declaration. (Gore v. Baker, 4 E. & B. 470; 24 L. J., Q. B. 94.)

It will be noticed that the rule laid down in Phillips v. Higgins (20 L. J., Q. B. 357), that a general finding in favour of the plaintiff is sufficient, only applies where the reference is merely of matters in difference in a cause, and the case would be otherwise where the reference is of the cause and all matters in difference (per Parke, B., in Humphrey v. Pearce, supra); and per Denman, C. J. (Stonehewer v. Farrar, 6 Q. B. 740), all arbitrators would do wisely by finding on each issue.

Usually awarding a general verdict in favour of the Awarding a plaintiff or defendant will be considered a finding of all general

CHAP. XII. the issues in his favour. (Dresser v. Stansfield, 14 M. & W. 822; Cooper v. Langdon, 9 M. & W. 60.) But in a case in the Common Pleas, in an action on the usual money counts, with pleas of never indebted, Statute of Limitations, payment, set-off, accord and satisfaction, an award that the defendant was not at the time of action indebted to the plaintiff and directing a verdict in defendant's favour was held insufficient. (Holland v. Judd, 3 C. B., N. S. 826.)

No finding on issues necessary where arbitrator is to tax costs;

On a reference of a cause and all matters in difference. all costs to abide the event and to be taxed by the arbitrator, he need not decide the issues separately from the other matters in difference, or state the amount of the costs separately, but directing the one party to pay a specified sum is a sufficient decision of all matters. (Bradley v. Phelps, 6 Ex. 897.)

or where costs of cause do not abide the event;

Where only the costs of the reference and award. and not the costs of the cause, are to abide the event, it is not necessary for the arbitrator to find upon each issue unless requested to do so. (Duckworth v. Harrison, 7 Dow. 71; Rennie v. Mills, 7 Scott, 276.)

or where issue has not been joined.

Where a declaration contains several counts, and before plea the cause is referred, the arbitrator is not bound to find upon each count notwithstanding the costs of the cause abide the event, for before plea is pleaded it is impossible to say what the issues will be; it is sufficient if he decide in whose favour the cause is determined. (Bearup v. Peacock, 2 D. & L. 850; 14 M. & W. 149; Crawshaw v. York and North Midland Rail. Co., 21 L. J., Q. B. 274; and see Nicholson v. Sykes, 23 L. J., Ex. 193.) An award made in two causes referred before plea, that all further proceedings should cease and be no further prosecuted, and that the defendant should pay a specified sum in full of all demands in the said causes, was held a sufficient determination CHAP. XII. of both causes. (Wynne v. Edwards, 12 M. & W. 708; see Eardley v. Steer, 4 Dow. 423; 2 C. M. & R. 327; Harding v. Forshaw, 1 M. & W. 415.)

There is no necessity to find upon issues on a reference of a cause, unless it is clear that issues have been so joined as to be capable of being specifically disposed of. So that on a reference after plea and before issue joined, a specific finding on the issues is not necessary. (Smith v. Reece, 6 D. & L. 520.)

Neither on a reference of a cause before trial, nor on Arbitrator not a reference of a cause at nisi prius without a verdict empowered to direct a verdict being taken subject to the award, has an arbitrator to be entered unless authopower to order a verdict to be entered up unless there rized. is an express power to that effect in the submission. (Angus v. Redford, 11 M. & W. 69; Hutchinson v. Blackwell, 8 Bing. 331; Harding v. Forshaw, 1 M. & W. 415.)

Usually, however, on a reference of a cause, whether at nisi prius or before trial, the arbitrator is expressly empowered to direct the entry of a verdict.

An unauthorized direction that a verdict shall be entered for a specified sum for the plaintiff does not amount to a direction to the defendant to pay that sum, nor can the payment be enforced by attachment, but the award will be set aside. (Donlan v. Brett, 2 A. & E. 344; Hawkyard v. Stocks, 2 D. & L. 936; Law v. Blackburrow, 23 L. J., C. P. 28.)

An award in favour of a plaintiff, whether on the Arbitrator whole or only part of the cause of action, should state plaintiff the amount of damages he is entitled to recover. in a reference of a cause in which there were seven issues, the costs of award and reference to abide the event, and the arbitrator found for the plaintiff on two

Thus, should award damages.

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issues, neither of which covered the cause of action, and for the plaintiff on the others, but omitted to award damages, the award was held bad. (Wood v. Duncan, 7 Dow. 91.) And where a verdict for 1,000l. was taken subject to a reference, and the arbitrator found for the plaintiff but assessed no damages, and the plaintiff entered up judgment for the 1,000l.; the court held that the plaintiff was entitled only to nominal damages. (Brown v. Somerset and Dorset Rail. Co., 34 L. J., Ex. 152.) But where an action on a money bond and all matters in difference were referred, and the arbitrator directed a verdict to be entered for the plaintiff, it was held sufficient, though it did not state for what amount, for there was no evidence that any other matters than the penalty on the bond were in difference, and if the plaintiff recovered a verdict it must mean for the whole amount of the penalty. (Cayme v. Watts, 3 D. & R. 224.) Where a verdict was taken for the plaintiff subject to a reference of the cause and all matters in difference, the arbitrator having power to vacate the verdict or reduce the damages, and he awarded that the plaintiff was entitled to demand of the defendant 901. in respect of the cause of action, and that the defendant was entitled to set off 351. in respect of matters mentioned in the plea of set-off; it was held that the award sufficiently ascertained the amount for which verdict was to be entered, as all that was necessary was to deduct one sum from the other. (Platt v. Hall, 2 M. & W. 391.) So an award in an action on a covenant where there was only one breach, directing a verdict to be entered for the plaintiff on each of the two issues raised by the pleas, with separate damages on each, was held sufficient, as the verdict might be entered for the aggregate sum of the two separate amounts. (Smith

v. Festiniog Rail. Co., 4 Bing. N. C. 23; 6 Dow. Chap. XII. 190.)

An arbitrator may not award damages if he finds on When arbia plea which covers the whole cause of action and com- a plea covering pletely answers the plaintiff's claim, and if he does the action, no finding as to damages will be rejected as mere surplus-damages age. (Warwick v. Cox, 1 D. & L. 986; Savage v. Ashwin, 4 M. & W. 530.) But if on a reference of a cause, the costs to abide the event, and the arbitrator finds for the defendant on a plea which covers the whole cause of action, it is no objection to the award that on other issues he finds for the plaintiff without damages; in fact he should so find. (Ross v. Clifton, 12 L. J., Q. B. 265; 2 Dow. N. S. 983.)

The arbitrator cannot (as far as relates to an action Damages not referred) award payment of a greater sum than the amount taken. damages taken subject to the reference; and if he do no assumpsit by implication will arise to pay, even to the extent of the amount so taken. (Bonner v. Charlton, 5 East, 139.) But if an arbitrator awards a greater sum than the amount of the verdict, and judgment is entered for the whole, and it appears that part of the sum is covered by a countervailing demand which never was a subject of dispute, so that only a balance less than the amount of the verdict is ultimately to be paid over: the court will reduce the judgment to the amount of the verdict, and grant execution for the sum really due. (Prentice v. Reed, 1 Taunt. 151.)

The court will not, after a verdict taken for the damages laid in the declaration, allow the declaration to be amended so as to enlarge those damages, even upon affidavit that a greater debt can be proved before the arbitrator. (Pearse v. Cameron, 1 M. & S. 675.)

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An arbitrator should not award the defendant to pay a larger sum than is claimed in the plaintiff's particulars of demand. But the particulars are not necessarily before the arbitrator even where the cause is referred at nisi prius; therefore, if it is intended to limit the plaintiff's demand to the amount claimed by the particulars, they should be brought before the arbitrator. (Kenrick v. Phillips, 7 M. & W. 415.)

Damages not limited when all matters in difference referred. If a cause and all matters in difference be referred, the arbitrator will not of necessity be confined to the amount of damages for which the verdict is taken, and if he award a greater sum the plaintiff will have a remedy under the award but not under the verdict. (Pearse v. Cameron, supra.)

Awarding damages in the cause and in the other matters separately.

The older cases lay down the rule that where a cause and all matters in difference are referred, and the arbitrator finds that the plaintiff is entitled to recover, he must award how much is due in respect of the cause and how much in respect of the matters in difference (Lund v. Hudson, 1 D. & L. 236; Crosbie v. Holmes, 15 L. J., Q. B. 125); but it is said they have gone to an extreme degree of strictness. (Bradley v. Phelps, 21 L. J., Ex. 310, per Parke, B.) It is, however, advisable to state in an award how much of the damages is for each, that it may be plainly seen that the arbitrator has not exceeded the assigned limits in respect of the former ( Taylor v. Shuttleworth, 6 Bing. N. C. 277; Taylor v. Marling, 2 M. & G. 55); and it is necessary to do so to enable a verdict to be entered for the former (Bonner v. Charlton, 5 East, 139.)

Awarding plaintiff to pay a sum of money.

Where a cause only is referred, the arbitrator has no authority to order the plaintiff to pay a sum of money (*Poyner v. Hatton*, 7 M. & W. 211); but if the sub-

mission is of a cause and all matters in difference, the arbitrator ought to ascertain the amount of the defendant's claim, and if it exceed the plaintiff's demand to direct the plaintiff to pay the balance. (Malony v. Stockley, 2 Dow. N. S. 122; 4 M. & G. 647; Williams v. Moulsdale, 7 M. & W. 134.)

Where costs were in the discretion of the arbitrator, Awarding a an award that certain actions should be discontinued, and that each party should pay his own costs, was considered sufficient, being in effect an award of a stet processus. (Blanchard v. Lilly, 9 East, 497.) But an arbitrator cannot in any case award a stet processus unless he has power over the costs. (Hunt v. Hunt, 5 Dow. 442; In re Leeming, 5 B. & Ad. 403.)

On a reference of a cause and all matters in difference. Nonsuit. with a power to the arbitrator to enter a nonsuit, and he directed that to be done, the court held that he ought to have finally determined upon the matters litigated between the parties. (Wild v. Holt, 9 M. & W. 161.)

On a reference of a cause in which there are only Directing issues of fact to be determined, the arbitrator has no judgment to be entered. power to arrest judgment or direct judgment to be entered up for either party, even though the submission empower him to direct the entry of a verdict and to determine what he shall think fit to be done by either of the parties. (Angus v. Redford, 11 M. & W. 69; 2 Dow. N. S. 735.) It would be otherwise if he had issues of law also to decide (ibid.); and it seems that when a cause is referred after a demurrer to one of the pleadings, the arbitrator, when it is necessary for the purpose of properly determining the cause, may direct a judgment to be entered as to the demurrer. (Mathew v. Davis, 1 Dow. N. S. 679.)

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When a judge's order authorized "final judgment to be signed by the plaintiff or defendants as the case may be, or in such manner or upon such terms as may be decided by the award or certificate of the arbitrator," the court refused on motion to set aside the certificate of the arbitrator "that final judgment should be signed for the defendants in this cause," because it did not specify the kind of judgment. (Smith v. Reece, 6 D. & L. 520.)

An arbitrator cannot, without express power, award judgment non obstante veredicto. (Toby v. Lovibond, 5 C. B. 770; Linegar v. Pearce, 9 Exch. 417.)

Award on a suit in Chancery.

An award that a suit in Chancery shall be dismissed is a sufficiently final determination of the suit. (*Pearse* v. *Pearse*, 9 B. & C. 484; *Tribe* v. *Upperton*, 3 A. & E. 295.)

### CHAPTER XIII.

COSTS.

### SECT. 1.— Costs of the Reference.

THE arbitrator's power over the costs of the reference CHAP. XIII. depends entirely upon the terms of the submission. Where the Where there is no cause in court, and no provision is silent as to made about costs in the submission, the arbitrator has no power to award them. But where a cause is referred, and the order of reference is silent as to costs, there is a distinction as to the power of the arbitrator with respect to the costs of the cause and those of the reference. As to the former, the power of awarding costs is necessarily consequent on the authority conferred of determining the cause; but as to the costs of the reference and award in such a case, the arbitrator has no power to adjudicate upon them, being matters not submitted to him as arising subsequent to the time of submission; but each party must bear his own expense of the reference and the half of the award. (Taylor v. Gordon, 9 Bing. 570; Whitehead v. Firth, 12 East, 165; Firth v. Robinson, 1 B. & C. 277; Bell v. Belson, 2 Chit. 157; Bradley v. Tunstow, 1 B. & P. 34.)

If a cause is referred, and the submission makes pro- What included vision for the "costs," either that they shall be in the "nder term costs." discretion of the arbitrator or abide the event, and there is nothing to limit the generality of the term "costs," it

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Where costs abide the event.

will include costs of the reference and award as well as costs of the cause. (Wood v. O'Kelly, 9 East, 436.)

Sometimes by the terms of the submission the costs of the reference are to abide the event, in which case the arbitrator has no power over them, but the party in whose favour the entire event of the award is, will be entitled to them by virtue of the reference. case it is not necessary the arbitrator should give any specific directions as to costs; it is sufficient (where a cause only is referred) if he directs how the issues ought to be found, and that is the proper course for him to pursue. (Gore v. Baker, 4 E. & B. 470; Hemsworth v. Brian, 1 C. B. 131.) And if the necessary consequence of the finding is that the suit is determined in favour of one of the parties, such party will be entitled to the costs of the reference. (Eardley v. Steer, 2 C. M. & R. 327; Humphrey v. Pearce, 7 Ex. 696.) When a cause is referred before issue joined, and the costs of the reference and of the award are to abide the event, this means the event of the award generally without relation to the issues. (Kelcey v. Stupples, 32 L. J., Ex. 6; 1 H. & C. 576.) If not only a cause but also matters in difference are referred under a submission providing that costs shall abide the event, should the award be in favour of the same party as to both he will be entitled to the costs of the action, and also of the Should the action be determined by the reference. award in favour of one, and the matters in difference be given for the other, the former will be entitled to the costs of the action; but there will be no costs of the reference on either side. And the reason is that as the action and the matters in difference were referred and each party has succeeded as to part, each being partially successful neither can be called upon to pay the costs

in a matter in which he has not failed; or, to express CHAP. XIII. it in other words, both matters being mixed up in the reference it cannot be said that either party has been successful. (Reynolds v. Harris, 28 L. J., C. P. 26; 3 C. B., N. S. 267; Marsack v. Webber, 2 E. & E. 637; 29 L. J., Q. B. 109; Marshall on Costs, 429.) In Gribble v. Buchanan (18 C. B. 691; 26 L. J., C. P. 24), where by the order of reference the costs of the cause were to abide the event of the cause, and the costs of the reference and award were to abide the event of the award, and the arbitrator awarded the plaintiff a sum of money in respect of the action, but as to the matters in difference found that 61. was due from the plaintiff to the defendant, the court held that, as the arbitrator had awarded in favour of each, neither was entitled to the costs of the reference and award. fore it seems that where a cause and all matters in difference are referred under an order providing that costs shall abide the event, each party must necessarily pay his own costs of reference unless everything is found in (Boodle v. Davies, 3 A. & E. 200, 209; Stevens v. Chapman, L. R., 6 Ex. 213; 40 L. J., Ex. 123.) In a reference of accounts, including accounts for which an action is brought, the party in whose favour the balance is found is entitled to the costs. (Hemsworth v. Brian, 1 C. B. 131.) Where a cause and all matters in difference were referred by an order of nisi prius, which provided that the costs of the reference and award should abide the event of the award. and the arbitrator decided the cause in favour of the defendant, and with respect to the matters in difference awarded that the plaintiff had a valid claim against the defendant, and that the defendant had a valid claim against the plaintiff of larger amount, and directed the

CHAP. XIII. plaintiff to pay the difference to the defendant—the claims were unliquidated and could not have been set off against one another in an action: it was held that the event of the reference was wholly in the defendant's favour, and that he was therefore entitled to the costs of the reference and award. (Dunhill v. Ford, L. R., 3 C. P. 36.) Where the arbitrator awarded that on the doing of certain things on both sides the action should cease, the court held that the event of the award was that each should pay his own costs. Knight, 2 Bing. N. C. 277.)

> When the costs of the cause only are to abide the event, and the costs of the reference are in the discretion of the arbitrator, the arbitrator may award as he pleases with respect to the latter. (Brown v. Nelson, 13 M. & W. 397.)

What are costs of the reference.

The expenses incurred by the parties of the whole inquiry before the arbitrator, whether in respect of matters in a cause or matters out of it, are costs of the Generally, where a cause is referred the reference. costs of the reference are not costs in the cause; the latter only including costs up to the order of reference. (Brown v. Nelson, 13 M. & W. 397; 2 D. & L. 405; Tregoning v. Attenborough, 1 Dow. 225; 7 Bing. 733; Mackintosh v. Blyth, 8 Moore, 211.) Thus, the costs of witnesses examined before the arbitrator, to prove the issues in a cause, are costs of the reference, not costs in the cause. (Brown v. Nelson supra; Fryer v. Sturt, 24 L. J., C. P. 154.) But where a verdict is taken subject to a reference of the action to an arbitrator who is to certify for whom and for what amount the verdict shall be entered, and the costs are to abide the event, the costs of the reference are costs in the cause and follow the legal event of the verdict. (Deere

v. Kirkhouse, 20 L. J., Q. B. 195; 1 L. M. & P. 783; CHAP. XIII. Brown v. Nelson, supra.) So if a verdict be taken, subject to a special case to be stated by a person named, who, in the event of the court deciding in favour of the plaintiff, is empowered to direct for what amount the verdict is to be entered, and to whom the action and all matters in difference, subject to the special case, are referred, all costs up to the judgment of the court on the special case are costs in the cause. (Edwards v. Great Western Rail. Co., 12 C. B. 419.) Where at the trial of a cause a verdict was taken for the sum claimed, subject to a reference to an arbitrator to reduce the amount if he should think proper; the arbitrator made a formal award directing the amount of the verdict to be reduced to 1s.; it was held that the decision of the arbitrator, though in form an award, was in substance a certificate, and that the plaintiff was therefore entitled to costs of the reference as costs in the cause. (Sim v. Edwards, 25 L. J., C. P. 175; 17 C. B. 527.)

The costs of the award are the amount of the arbitra- What are costs They are deemed part of the costs of the reference and follow the same rules. The arbitrator should not fix his own fee by the award. (Re Coombes, 4 Exch. 839; Roberts v. Eberhardt, 27 L. J., C. P. 482.) But if he does the court will not in general set aside the award (Rose v. Redfern, 10 W. R. 91); though in one case, when the arbitrator had named the amount of his own costs in the award, the court refused to enforce the award in a summary manner. son v. Smith, 30 L. J., Q. B. 178.) The proper way is to direct which party is to pay the costs of the award without naming any sum, then notify to the parties the amount of his charges, and refuse to give up the award until the amount is paid. (Ante, p. 78.)

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Costs of a second award.

Where an award, being defective, is referred back by the court to the arbitrator, who hears fresh evidence and makes a second award, the arbitrator's charges are to be borne equally. (Blair v. Jones, 20 L. J., Ex. 295; 6 Exch. 701.) If the necessity of a second reference is occasioned by the default of one of the parties, then he will be required to pay the costs of the first reference. (Gladwin v. Chilcote, 9 Dow. 550.)

Should the submission contemplate the possibility of an original and supplementary award, and give the arbitrator discretionary power over the costs of reference and the award, and it is referred back to him to reconsider a prospective direction, and the rule referring back is silent as to costs, the clause in the submission as to costs gives the arbitrator power over the costs of the second reference, for the second reference is a part or rather a continuation of the reference. (Johnson v. Latham, 20 L. J., Q. B. 236.)

Abortive reference.

The costs of an abortive reference are not costs in the cause. (*Doe* d. *Davis* v. *Morgan*, 4 M. & W. 171.)

# SECT. 2.—Costs of the Cause.

Where the reference is silent as to costs.

Where an action is referred, the arbitrator may order either party to pay the costs of the action although no express authority is given to him upon that subject by the rule or order of reference (Roe d. Wood v. Doe, 2 T. R. 644); and this, although not only the cause but all matters in difference are referred. (Whitehead v. Firth, 12 East, 165; Firth v. Robinson, 1 B. & C. 277; Lewis v. Harris, 4 D. & R. 129.)

Where costs abide the event. If by the rule or order the costs of the cause are to "abide the event," the arbitrator cannot exercise any

discretion in the awarding of them, or even in fixing CHAP. XIII. (Kendrick v. Davies, 5 Dow. 693.) And the arbitrator need not notice the costs when they are to abide the event. (Jupp v. Grayson, 1 C. M. & R. 523; Spivy v. Webster, 2 Dow. 46; Ward v. Hall, 9 Dow. 610.) In such a case, if the arbitrator award entirely in favour of one party, or if he award upon different issues, some in favour of one party, some in favour of the other, the costs follow and are taxed in the same manner as if the finding were by verdict. (Daubuz v. Rickman, 1 Scott, 564; Yates v. Knight, 2 Bing. N. C. 277; Reynolds v. Harris, 28 L. J., C. P. 26; 3 C. B., N. S. 267.) If he give any directions as to the costs they will generally be rejected as surplusage, and the rest of the award held good; and where by an order of reference the costs of the cause were to abide the event, and the arbitrator decided the suit in favour of the defendant and ordered the plaintiff on a certain day to pay him those costs, it was held that the award was good, as the defendant was not deprived of any right to recover costs at an earlier date. (Cochburn v. Newton, 9 Dow. 676.) On a reference of a cause and matters in difference, where "the costs of the cause shall abide the event of the reference," the "event of the reference" must be taken to mean the event so far as the action is concerned. Chapman, L. R., 6 Ex. 213; explaining Boodle v. Davies, 3 A. & E. 200, and Gribble v. Buchanan, 18 C. B. 691.)

The defendant is entitled to the general costs of the cause if he succeeds on a plea going to the whole cause of action, though the other issues are directed to be entered for the plaintiff with damages. (Ross v. Clifton, 12 L. J., Q. B. 265; 2 Dow. N. S. 983.)

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To what extent costs affected by county court acts.

Where the reference is at nisi prius, after a verdict has been taken subject to the reference, and the costs of the cause are to abide the event, the finding of the arbitrator has the same effect as a verdict, and the parties are in general entitled only to the same costs as on a verdict for the same amount as the damages given (Smith v. Edge, 2 H. & C. 659); and the same rule applies though the cause and all matters in difference be referred; but where the reference is by consent, before trial, and the costs are to abide the event, the plaintiff in general without reference to the County Court Acts is entitled to his costs, if he succeeds, whatever damages he may recover. (Frean v. Sargent, 32 L. J., Ex. 281; Griffiths v. Thomas, 15 L. J., Q. B. 336; Wigens v. Cook, 28 L. J., C. P. 312; 6 C. B., N. S. 784; Jones v. Jones, 29 L. J., C. P. 151; 7 C. B., N. S. 832.) And if a verdict be taken by consent, subject to a reference, "the costs of the cause to abide the event of the award, and the costs of the reference to be in the discretion of the arbitrator," the County Court Acts will not affect the arbitrator's right to award the costs of the reference, whatever damages he may give. (Forshaw v. De Wette, L. R., 6 Ex. 200.) In an earlier case in the Common Pleas, where an action was compulsorily referred to a master, it was ordered that the costs of the cause should abide the event, and that the costs of the reference should be in the discretion of the master, and the master awarded the plaintiff a less sum than 201., and directed the defendant to pay the costs of the reference; it was held, that the plaintiff was not entitled to these costs. (Moore v. Watson, L. R., 2 C. P. 314.) But the question in that case was whether effect could be given to the certificate of an arbitrator giving the plaintiff the costs of the reference,

and it was decided in the negative, but the certificate CHAP. XIII. was void because the costs of a compulsory reference are recovered on the judgment, and are part of the costs of the cause. (Per Kelly, C. B., Forshaw v. De Wette, supra.)

Where several actions were referred, "the costs of Costs of several the several actions and of all matters and things relating event as to thereto, to abide the event of the award," that was held to mean, that the costs in each action were to abide the event as to that action. (Jones v. Powell, 6 Dow. 483.) But where an action at law and a suit in equity were referred, and the costs were to abide the event, it was held, that the event meant the ultimate and general event, and not that the costs of each suit should abide the event as regarded the suit. (Reeves v. Macgregor, 9 A. & E. 576; 1 P. & D. 372.)

Generally, as before remarked, a party is entitled When successunder an award in his favour to the same costs as on titled to costs verdict to the same effect; but the award does not of allowed by particular itself entitle the party in whose favour it is made to statutes. costs allowed by particular statutes on verdict, nonsuit, or other specified modes of termination of the suit, unless the arbitrator, has and exercises, the power of ordering the suit to be terminated in that particular mode. (Holder v. Raith, 4 N. & M. 466.) Therefore, a defendant in replevin is not entitled to double costs under 11 Geo. 2, c. 19, s. 22, on an award in his favour, in pursuance of a reference before issue joined. (Gurney v. Buller, 1 B. & A. 670; Barnard v. Moss, 1 H. Bl. 107.) And the court cannot award costs under 43 Geo. 3, c. 46, s. 3, to a defendant, where the plaintiff on a reference before issue joined, has been awarded an amount less than that for which he has arrested the defendant. (Holder v. Raith, supra.) Upon a refer-

ful party en-

CHAP. XIII. ence at nisi prius, the parties may by the order agree that the arbitrator shall be in the same situation and have the same powers that a judge has under 3 & 4 Vict. c. 24, s. 2, if he awards a verdict for the plaintiff with nominal damages, to certify that the action was brought to try a right other than the mere right to damages; and if so agreed, the arbitrator must in all substantial forms follow the rules laid down in the statute for the guidance of the judge. (Spain v. Cadell, 8 M. & W. 129; 9 Dow. 745.) The arbitrator's certificate for costs under this act must be given at the time of making the award, and should be given in the award itself. (Ib.) The court will not interpose to control the discretion of an arbitrator who, having power to do so, has refused to certify under this enactment. (Bury v. Dunn, 1 D. & L. 141.) An arbitrator to whom a cause is referred at nisi prius, with all the powers of a judge at nisi prius, to certify that the cause was proper to be tried by a special jury, cannot give a certificate for the costs after he has published his award without providing for them therein. (Geeves v. Gorton, 15 M. & W. 186.) When a cause was referred by order of nisi prius, and by the order the costs of the cause were to abide the event of the award. and the costs of the special jury, which had been obtained on the motion of the defendant, and of the reference were to be in the discretion of the arbitrator: the court held that the arbitrator had only the power of allowing the costs of the special jury as costs in the cause if the party who moved for the same were to succeed; and, therefore, that after awarding a verdict for the plaintiff, he could not award that he should pay the costs of the special jury. (Finlayson v. M'Leod, 1 B. & A. 663; 2 Chit. Arch. 1664.)

A rule or order under sect. 3 of the C. L. P. Act, CHAP. XIII. 1854, which is silent as to costs, does not confer on the Costs of arbitrator power to deal with the costs either of the compulsory cause, reference or award. The successful party, therefore, under such a reference is not entitled to costs (Bell v. Postlethwaite, 25 L. J., Q. B. 63; 5 E. & B. 695; Leggo v. Young, 24 L. J., C. P. 200; 16 C. B. 626); but where the parties had drawn up the rule in general form, under the mistaken belief that nothing being said about costs, the costs would abide the event, the court after the award was published amended the rule of reference, so as to make it express the intention of the parties. (Bell v. Postlethwaite, supra.)

Where an order to stay proceedings in an action has Power of court been made under sect. 11 of the C. L. P. Act, 1854, on to vary order under sect. 11, the ground that the parties had agreed to refer, the C. L. P. Act, 1854, as to court or judge has power to vary such order as to costs costs. of the action at any time, even after the award has been made. (Bustros v. Lenders, L. R., 6 C. P. 259; 40 L. J., C. P. 193.)

## SECT. 3.—Arbitrator's Power over Costs within the Submission.

When an arbitrator has a discretion to exercise upon How the the subject of costs, he may order either party to pay the costs, or each to pay a moiety, or the like. (Cargey v. Aitcheson, 2 B. & C. 170.) He may direct an infant party to the reference, or a person (not a party to the cause), made a party to the reference by consent, to pay the whole costs. (Proudfoot v. Boyle, 15 M. & W. 198.) Where an award contained a direction for plaintiff to pay defendant's costs, but no direction was

discretion may

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given about payment of plaintiff's costs, it was held to be sufficiently evident that the plaintiff was to pay his own costs. (Rose v. Redfern, 10 W. R. 91.) And it is sufficient if the award directs by whom the costs are to be paid without saying they are to be paid to the opposite party. (Baily v. Curling, 20 L. J., Q. B. 235.) Where a reference was of matters in difference between three parties, and the award directed that the costs of the arbitration should be paid by them in equal proportions, without showing to whom or in what manner they should be paid, the court held that it sufficiently appeared that they were to be paid to the arbitrator. (In re Young, 22 L. J., C. P. 160; 13 C. B. 623.)

Costs as between party and party. In a reference at common law the arbitrator has no power, unless specially authorized, to award any costs other than the common costs as between party and party. (Marder v. Cox, Cowp. 127; Seckham v. Babb, 8 Dow. 167; Barker v. Tibson, 2 Bla. Rep. 953; Whitehead v. Firth, 12 East, 165; Eccles v. Blackburn, 30 L. J., Ex. 358.) If he award costs as between attorney and client, and the costs be so taxed, the court should be moved to set aside the award, not to review the taxation. (Bartle v. Musgrave, 1 Dow. N. S. 325.)

As between solicitor and client.

Where there is a reference of a suit in chancery, and the costs both of the suit and the reference are in the arbitrator's discretion, that gives him jurisdiction to give costs as between solicitor and client if he thinks fit. (*Mordue* v. *Palmer*, 39 L. J., Ch. 746; 40 L. J., Ch. 8; L. R., 6 Ch. Ap. 22.)

When the amount of costs must be fixed in the award.

If the costs are in the discretion of the arbitrator "who shall ascertain the same," he is bound to ascertain and determine the amount of them or the award will be bad, for the master's taxation will not supply the omis-

(Morgan v. Smith, 1 Dow. N. S. 617; 9 M. & CHAP. XIII. W. 427; Grenfell v. Edgcome, 7 Q. B. 661.) Where an agreement of reference contained a stipulation that "the costs of the agreement and of the reference and award should be in the discretion of the arbitrator and be defrayed as he should direct," and the arbitrator awarded that the defendant should pay a certain sum to the plaintiff, but made no mention of costs: it was held that the award was therefore bad. (Richardsonv. Worsley, 19 L. J., Ex. 317; 5 Ex. 613.)

The arbitrator when empowered to award costs has Awarding a a very wide discretion. If the submission make no gross sum for costs. provision for their being taxed, he may award a gross sum for costs, and the court will not review his discretion, unless the amount is grossly excessive. (Turner v. Rose, 1 Ld. Ken. 393.)

If the arbitrator have a discretion over the costs but When costs no obligation to ascertain the amount and the reference to be asceris of a cause in one of the superior courts, or by an tained by taxation, agreement which can be made a rule of court, he need not ascertain the costs, but may leave them to be taxed by the officer of the court; and upon an award of costs generally to either of the parties they may be so taxed, even without any express direction to that effect. (Bhear v. Harradine, 21 L. J., Ex. 127; Holdsworth v. Wilson, 32 L. J., Q. B. 289.) If the reference is of an action in an inferior court, or by an agreement which cannot be made a rule of court, he should himself assess the costs. (Winter v. Garlick, 1 Salk. 75; Thorp v. Cole, 4 Dow. 457; Addison v. Grey, 2 Wils. 293.) An arbitrator cannot award costs to be taxed by any person but the proper officer of the superior court, for this would be a delegation of his authority; the taxation of costs by the master being a

CHAP. XIII. ministerial, and in any other person a judicial act-(Knott v. Long, 2 Stra. 1025.)

Invalid directions as to costs.

An award that the costs of making a submission a rule of court should be borne by such of the parties by whose disobedience the same should become necessary, was held to be uncertain and not final as to those costs, since it only provided for the case of disobedience by a single party, and not for the case of disobedience by several parties, or where there was no disobedience at all. (Smith v. Wilson, 18 L. J., Ex. 320; 2 Ex. 327; Williams v. Wilson, 23 L. J., Ex. 17; Re Morris and Morris, 25 L. J., Q. B. 261.) So where an action in which there were several issues was referred, and amongst other things the arbitrators awarded that the costs of the several issues should be paid "to the plaintiff or to the party entitled thereto:" the award so far as related to the costs was held void for uncertainty. (Hetherington v. Robinson, 8 L. J., Ex. 148.)

When an arbitrator directs one party to pay the costs of the cause, this will generally be understood to mean such costs only as the other party would be entitled to, if a verdict had been obtained to the same effect as the award. (Allenby v. Proudlock, 5 N. & M. 636; Rigby v. Okell, 7 B. & C. 57.)

An error as to costs will not vitiate the whole award. (Aitcheson v. Cargey, 9 Moore, 381; Roberts v. Eberhardt, 28 L. J., C. P. 74.)

Setting off costs of cross actions.

If two actions between the same parties are referred, the arbitrator cannot award the costs and damages in one to be set off against the costs and damages in the other to the prejudice of the attorney's lien, as that would be contrary to the rule of court. (Cowell v. Betteley, 10 Bing. 432.)

Mode of ascertaining the

Where the arbitrator directs that the costs of the re-

ference shall be paid by each party in specified proportions, the mode of ascertaining what sum each is to pay respective prois by adding together the costs of both, and apportioning to each the proportionate part to which he is liable. by the several Thus, if each is to pay a moiety of the costs of the reference, the costs of both will be brought as it were into hotchpot and half paid by each party. (Day v. Norris, 1 Dow. N. S. 353.)

portions when costs to be paid parties.

The payment of costs is enforced in the same manner as any other part of the award.

In a reference under the L. C. C. Act, 1845, all the Costs under costs of, and incident to the arbitration are to be borne 1845. by the promoters, unless the arbitrators award the same or a less sum than shall have been offered by the promoters; in which case each party is to bear his own costs incident to the arbitration, and the costs of the arbitrators are to be borne by the parties in equal pro-(Sect. 34; and see Lloyd on Compensation, 157.)

But by the Lands Clauses Consolidation Act, 1869, the costs of and incident to the arbitration and award shall, if either party so requires, be taxed by the taxing master of one of the superior courts (32 & 33 Vict. This act is not retrospective. (Doulton v. Metropolitan Board of Works, L. R., 5 Q. B. 333; 39 L. J., Q. B. 165.)

Under the Railways Clauses Act, 1845, and the Public Health Act, 1848, the costs are left to the discretion of the arbitrator; and so, subject to the agreement of the companies, are the costs of an arbitration under the Railway Companies Arbitration Act, 1859.

When an order of reference of an appeal at quarter Costs of resessions is silent as to costs, the arbitrator has no power ference at over the costs of the appeal (West London Rail. Co. sions.

CHAP. XIII. V. Fulham Union, 39 L. J., Q. B. 178; L. R., 5 Q. B. 361); nor can any subsequent court of quarter sessions order them, though the appeal may have been regularly adjourned from session to session (Ib., 40 L. J., M. C. 109); nor in a like case can the court order the payment of the costs of the reference. JJ. West Riding, 34 L. J., M. C. 142; 13 W. R. 738.)

## SECT. 4. — Taxation of Costs.

When costs may be taxed.

We have seen, supra, in what cases costs may be taxed by the officer of the court, namely, where the submission can be made a rule of court, and the arbitrator has not awarded a gross sum for costs, but costs generally, with or without any express direction as to their being taxed.

Costs will not be taxed until after the submission has been made a rule of court.

May be taxed though time for setting aside the award has not elapsed.

Formerly, where a verdict had been taken subject to a reference, the party in whose favour the award was made was not entitled to have his costs taxed until the time had expired within which it was open to the unsuccessful party to move to set it aside. (Hobdell v. Miller, 2 Scott, N. R. 163.) But now, by Reg. Gen. H. T. 1853, r. 170, it is ordered, that "costs may be taxed on an award notwithstanding the time for setting aside the award has not elapsed." The like notice and appointment to tax must be given as in other cases (see Reg. Gen. H. T. 1853, r. 59).

Where the reference is of a cause the rule of Reg. Gen. H. T. 1853, r. 62, as to setting off the costs of the issues found for one party against those of the issues

found for the opposite party applies. The fact that at CHAP. XIII. the time of the reference the issue was not made up makes no difference. (Daubuz v. Richman, 1 Scott, 564.)

Where a cause is referred at nisi prius and less than Taxation on 201. is awarded, the costs of the cause must be taxed on scale. the lower scale, unless there be an express provision to the contrary in the submission. The plaintiff's attorney should therefore take care that the submission, or rule of reference, express that the arbitrator shall have power to certify as a judge might. (Wallen v. Smith, 5 M. & W. 159; Lund v. Hudson, 1 D. & L. 236; Elleman v. Williams, 2 D. & L. 46; Astley v. Joy, 9 A. & E. 702.) The taxation on the lower scale, however, applies only to the costs in the cause, and not to the costs of the reference, to which the rule of court has no application. Such costs, therefore, where they are not to be treated as costs in the cause, are allowed on the ordinary scale, notwithstanding the costs in the action referred may be taxed on the reduced scale.

The master must tax the costs according to the language of the award. And the courts will sometimes, when there is a difficulty in construing the legal effect of an award, direct the master how the costs are to be (Reynolds v. Harris, 28 L. J., C. P. 26.)

The same allowance is made for witnesses attending Costs of witbefore an arbitrator as upon the trial of a cause at nisi nesses. prius. (Dax, Pr. 250.) Where a witness is rejected before the arbitrator, his costs will not be allowed on taxation. (Galloway v. Keyworth, 15 C. B. 228.)

The costs of the attendance of counsel will be allowed Fees to where it is proper counsel should attend. It is the general practice of the court not to allow the costs of more than one counsel attending the arbitrator on each

CHAP. XIII. side, in an ordinary reference (Hawkins v. Rigby, 29 L. J., C. P. 228); but there is no inflexible rule, and if the case be of great importance or difficulty, and two counsel attend, their fees will be allowed. (Sinclair v. Great Eastern Rail. Co., 39 L. J., C. P. 165.) But the costs of shorthand-writers' notes for the use of counsel will not be allowed, although it may be in a case in which a second counsel would be allowed for. (Croomes v. Gore, 1 H. & N. 14; 25 L. J., Ex. 267.)

Arbitrator's charges.

As between the parties the arbitrator's charges may be reviewed on taxation. (Barnes v. Hayward, 1 H. & N. 742.) But it is not usual for the master to question the arbitrator's charges, but to pass them without inquiry, especially if he be a barrister. (Smith v. Troup, 7 C. B. 757.) In taxation there is no different scale whether the arbitrator be a queen's counsel or junior only; but in all cases it is in the discretion of the master to allow such remuneration as the difficulty and nature of the arbitration may, in his opinion, justify. (Sinclair v. Great Eastern Rail. Co., 39 L. J., C. P. 165.) A lay arbitrator may employ a professional person to draw his award. But where a separate charge was made for an attorney's costs of preparing the award, the arbitrator having charged a sufficient sum for the award; it was held that the master was right in disallowing the amount of the attorney's bill in the costs. (Galloway v. Keyworth, 23 L. J., C. P. 218; 15 C. B. 228.)

If the arbitrator award the defendant to pay the plaintiff his costs of suit, to be taxed by the proper officer before a particular day, it is the defendant's business to have them taxed before that day (Candler v. Fuller, Willes, 62); and if he do not, the plaintiff may proceed to have them taxed ex parte. (Sadler v. Robins, 1 Camp. 253.)

If a verdict has been taken at nisi prius, and one CHAP. XIII. party is entitled to the costs of the cause and also to the costs of the reference, such costs should be taxed separately if it is intended to sign judgment for the costs of When the arbitrator directs that the costs of the cause shall be taxed by the proper officer, they should be taxed according to the postea. (Allenby v. Proudlock, 5 N. & M. 636.)

#### CHAPTER XIV.

#### REFERRING BACK AN AWARD.

CHAP. XIV. AFTER an award is made and published the arbitrator, as we have seen (ante, p. 107), has no power in himself to alter it. Before the C. L. P. Act, 1854, the court had power, only with the assent of the parties, to send the award back to the arbitrator if he had made any mistake in it which might be amended; and it was usual to insert a clause in the submission empowering the court in the event of either of the parties moving to set the award, or any part of it, aside, to remit the matters thereby referred to the reconsideration of the arbitrator. But now sect. 8, C. L. P. Act, 1854, provides, that "In any case, where reference shall be made to arbitration as aforesaid, the court or judge shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the reconsideration and redetermination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said court or judge may seem proper."

Power to remit given by C. L. P. Act, 1854.

To what references the provision extends.

This section extends not only to compulsory references provided for in sect. 6, but to all references where, by the consent of the parties, the submission may be made a rule of court. (Re Morris and Morris, 6 E. & B. 383; 25 L. J., Q. B. 261.) Its object was, when any error, formal or otherwise, had occurred which would vitiate the award, to enable the court to send it back, if they thought fit, to the arbitrator to correct such error instead of setting the award wholly aside. (Mills v. CHAP. XIV. Bowyer's Society, 3 K. & J. 66.) And the general power to remit back thereby given, is not restrained by a clause in the submission, only empowering the court to refer back the award in case of a motion being made to set it aside. (Re Morris and Morris, supra.)

An award under the L. C. C. Act, 1845, is within the section, and may be referred back. (Dare Valley Rail. Co. v. Rhys, 38 L. J., Ch. 417.)

It has been held that the statutory power of remitting In what cases back only applies to such cases as might have been re- be remitted. mitted before the act if the submission had contained a clause to that effect. (Hodgkinson v. Fernie, 27 L. J., C. P. 66; 3 C. B., N. S. 189.) So, it has been held, that the courts have only power to refer back in such cases as they would have power to set aside an award. (Hogg v. Burgess, 27 L. J., Ex. 318; 3 H. & N. 293.) But this rule has not been always recognized; and it appears to have been laid down in a recent case, notwithstanding some strong dicta to the contrary in former decisions, that if an arbitrator admits he has made a mistake on the facts before him, though the mistake is not apparent on the face of the award, such admission is sufficient to empower the court to refer it back. (Flynn v. Robertson, 38 L. J., C. P. 240; and see Mills v. Bowyer's Society, 3 K. & J. 66.) But the circumstances of the case were very exceptional; for a cause having been referred to the master, and it being admitted at the reference that something was due to the plaintiff, the master certified that nothing was due: it was admitted on all hands and the arbitrator stated that he had made a mistake, but the defendant objected to the award going back; the Court of Common Pleas, however, held that it had power to refer the matter

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back-Smith, J., remarking, "It appears to me that in this case, there has been, in the legal sense, such misconduct as enables the court to send the matter back." And, again, though the discovery of new evidence would probably not induce the court to set aside an award, it would be ground for an application to refer back the award. Thus, where one party against whom an award was made applied to have it sent back, on the ground that he had since found a letter in the other party's handwriting containing material evidence in his favour, and which the arbitrator stated would have materially affected his decision, if it had been given in evidence before him: the court remitted the case to the arbitrator, though the other party swore that the letter was a forgery. (Burnard v. Wainwright, 19 L. J., Q. B. 423.)

The court will remit back an award to be re-executed when joint arbitrators have not all executed it together, or when any similar error has occurred involving no misconduct in the arbitrators or substantial injustice to the parties, it will be sent back to be corrected. (Anning v. Hartley, 27 L. J., Ex. 145.) And where an award was defective on the face of it in the mode of awarding costs, it was referred back for the sole purpose of correcting that defect. (Re Morris and Morris, 6 E. & B. 683.) Where a cause, in which several pleas were pleaded, was referred, and the arbitrator found a general verdict for the defendant and directed that the plaintiff should pay the costs of the reference, the award was sent back to be amended by stating the manner in which the several issues were found. (Holland v. Judd, 3 C. B., N. S. 826; Gore v. Baker, 24 L. J., Q. B. 94.) When a letter-book, containing copies of letters which had been adduced in evidence before an arbitra-

tor and marked by him as read, was, at the close of the CHAP. XIV. case, left in his hands in order that he might, before making his award, refer to the copies so adduced, and he referred to a copy of a letter contained in the book which had not been marked as adduced in evidence, the court ordered that the case should be referred back in order that the party against whom the letter was used might have an opportunity of explaining its contents. (Davenport v. Vickery, 9 W. R. 701.)

An award may be referred back when an arbitrator has omitted to decide upon some matter; but an application upon this ground must be supported by affidavits showing that the matter was brought before the arbitrator. (Erskine v. Wallace, 12 W. R. 134.)

If an arbitrator has awarded less than 20% in an action of contract, and has, through inadvertence, omitted to certify that the cause was fit to be tried before a judge of the superior courts, the matter may be referred back for amendment at the expense of the party who seeks to send it back. (Cross v. Cross, 13 C. B., N. S. 253; Caswell v. Groucutt, 31 L. J., Ex. 361; and see Harland v. Mayor of Newcastle, 39 L. J., Q. B. 67.)

If an award is good on the face of it, the courts will When an apnot refer it back for alleged mistake in law, attempted refer back will to be made out on affidavits. (Baguley v. Markwick, 30 be refused. L. J., C. P. 342.) Where, in a compulsory reference, the order contains a discretionary power for the master to state a case, the court will not set aside the certificate, or remit the case back to the master to state a case, when, at the hearing, he has declined to do so. (Holloway v. Francis, 9 C. B., N. S. 559; Gibbon v. Parker, 5 L. T., N. S. 584.) An agreement of reference in an appeal against a poor-rate contained a clause

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enabling the arbitrators, at the request of either party, to state a case to be settled by the umpire for the opinion of the court: the arbitrators having disagreed, the umpire made his umpirage, and subsequently, at the request of the appellants, set out the principles of law on which he had acted: the court refused to refer back the matter to enable the umpire to state the case more fully, as the appellants had had the opportunity of getting a case stated, and instead of doing so had taken their chance of getting the umpirage made in their favour. (Re The London Dock Co. v. The Parish of Shadwell, 32 L. J., Q. B. 30.)

Within what time application to remit should be made. Though the statute provides that the court may at "any time" refer back the award, the application should generally be made within the same time as an application to set it aside (Doe d. Banks v. Holmes, 12 Q. B. 951): for the court will not refer matters back where there has been a long delay since the last step was taken upon the award, and such delay is not satisfactorily explained; because the position of the parties may be altered, and they may be unable to produce their witnesses. (Doe d. Mays v. Cannell, 17 Jur. 347; 22 L. J., Q. B. 321.)

Award sent back to same arbitrator. As a general rule the award will be referred back to the same arbitrators when a mere formal error has occurred involving no misconduct in the arbitrators or substantial injustice to the parties, and there is no reason to suppose that they may not be trusted. (Anning v. Hartley, 27 L. J., Ex. 145.) And where the reference was to several arbitrators, with power to appoint a new one in case of the death of any, and one died after the award was made, it was remitted to the survivors and to a fresh one to be appointed in pursuance of the power in the submission. (Lord v. Hawkins, 2 H. & N. 55.)

But where an arbitrator in taking accounts allowed a CHAP. XIV. claim sent to him by one party after the last meeting, without communicating it to the other side, Romilly, M. R., thought it objectionable to send the award back to the same arbitrator, because, notwithstanding the perfect honesty and bona fides of an arbitrator, it is impossible where an award has been set aside and sent back upon such grounds, that there should not be, in spite of himself, some disposition to make it appear that the objections to the award were useless. (Re Tidswell, 33 Beav. 217.)

When matters are referred back, all the original Powers and powers of the arbitrator are generally revived. (M. Rae duty of arbitrator when v. M. Lean, 2 E. & B. 946.) He must hear additional award referred evidence if the matters remitted require it. where an award was remitted on the ground that the arbitrator had not finally disposed of a matter submitted to him and with respect to which he had received no evidence, and upon the parties attending before him and tendering evidence he refused to receive it, the court held that he ought to have received it. (Nichalls v. Warren, 6 Q. B. 615.) But if the award is remitted merely for a specific alteration in, or addition to it, in a matter upon which no assistance from either party is necessary, the arbitrator need not receive fresh evidence or give any notice to the parties to attend before him; as where the award is remitted that the arbitrator may correct a mistake apparent on the face of the award (Re Morris and Morris, 6 E. & B. 383); or determine the amount of costs to be paid by one of the parties (Ex parte Huntley, 22 L. J., Q. B. 277; 1 E. & B. 787); or that all the arbitrators may re-execute together, they having originally executed the award at different times and places (Anning v. Hartley, 27 L. J., Ex.

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145); or that a mistake in the christian name of one of the parties may be corrected. (Howett v. Clements, 7 M. & G. 1044.) And, in the latter case, it is sufficient if the arbitrator merely certifies that the award ought to be amended in the name without actually amending it. (Davies v. Pratt, 25 L. J., C. P. 71.) Where an arbitrator not having decided an issue on an account stated, the court directed the award to be sent back to him to be corrected in this particular: it was held, that he was not bound to rehear evidence. (Bird v. Penrice, 6 M. & W. 754.)

When a matter is remitted back to an arbitrator, who has made an award, for re-consideration, that award is avoided altogether. (Dare Valley Rail. Co. v. Rhys, 38 L. J., Ch. 417.) But if an award, good as to three points and bad as to the fourth, is sent back as to that alone, the arbitrator is functus officio as to the three, and cannot alter his judgment as to them. (Johnson v. Latham, 20 L. J., Q. B. 238, per Erle, J.)

Where the submission gives the arbitrator power over costs, the court on sending the award back to him may direct that the costs of the rule shall be in his discretion. (*Pearson* v. *Overell*, 12 W. R. 709.)

The amended award need not recite the rule or order referring the matter back, and if it misrecite it, it is immaterial. (Baker v. Hunter, 16 M. & W. 672.)

#### CHAPTER XV.

#### EFFECT OF AN AWARD.

A VALID award or arbitrator's certificate is binding on CHAP. XV. the parties and privies, and is a conclusive and final An award a judgment on the matters submitted, both at law and in final judgment. equity-debarring the parties both from appeal and from again litigating the same subject-matter. (Dudgeon v. Thomson, 1 Macq. 714; Williams v. Moulsdale, 7 M. & W. 134; Price v. Price, 9 Dow. 334.) But where a plaintiff had filed a bill in chancery against a defendant for infringing his patent, and for an injunction; and the matter was referred to an arbitrator who decided by inference, but by inference only, that the plaintiff was the true and first inventor, and therefore the letters-patent were not void;—this might be collected from the award, but was not so stated directly or positively; -it was held in an action afterwards by the same plaintiff against the same defendant, that the defendant was not estopped by that award from denying that the plaintiff was the true and first inventor, and therefore the patent was void; an award in that form being no estoppel. (Newall v. Elliot, 1 H. & C. 797.)

An arbitrator's decision upon a question of fact is conclusive; and where the claims of the plaintiff in an action were referred, it was held that the arbitrator's decision that a certain claim made by the defendant was within the submission was conclusive. (Faviell v. East-

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ern Counties Rail. Co., 2 Ex. 344; 17 L. J., Ex. 297.) But an arbitrator's decision as to the extent or limit of his authority is not in all cases conclusive. (1b.; Toby v. Lovibond, 5 C. B. 770.)

Effect of award on rights of strangers.

Ordinarily the rights of a stranger will not be affected by an award. (Thompson v. Noel, 1 Atk. 60.) But in a case in equity, where A., having a claim on property which he knew was the subject of a reference between C. and D., suffered the award to be made without bringing forward his claim, Shadwell, V. C., held that he was bound by the award. (Govett v. Richmond, 7 Sim. 1.) So, if the trustees of a bankrupt attend meetings under a reference to which the bankrupt was a party, and make no objections to the proceedings, they will be considered as adopting them and bound by the decision. (Dod v. Herring, 1 Russ. & M. 153.) And in an old case, where an award was made in an adverse suit between A. and B. and confirmed by the court, A. being then a bankrupt, but not being known to be so, a commission was afterwards taken out, and the award was held to bind the assigns under the commission. (Whitacre v. Pawlin, 2 Vern. 229.)

Effect of award on matters in difference not brought before arbitrator. An award is conclusive as to all such matters in difference between the parties as are within the scope of the reference, notwithstanding they were not brought before the attention of the arbitrator; for if one of the parties has neglected to bring before the arbitrator any matter when he might have done so, he cannot afterwards maintain an action on such matter, or take advantage of it in answer to a motion for attachment. Thus, where the reference was of "all actions and causes of actions between the parties," and after the award made the party thereby ordered to pay a sum of

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money wished to deduct from it a sum due to him from the opposite party, and which had not been under the consideration of the arbitrators: the court held that he could not do so, for the rule of reference was large enough to include that transaction, and it should have been discussed before the arbitrators. (Smith v. Johnson, 15 East, 213; Dunn v. Murray, 9 B. & C. 780; Dicas v. Jay, 6 Bing. 519.) But a reference of "all matters in difference" does not preclude one of the parties from afterwards suing for a cause of action subsisting at the time of reference, but not then a matter in difference. (Ravee v. Farmer, 4 T. R. 146; Thorpe v. Cooper, 5 Bing. 129.) And nothing but the questions actually referred are concluded by an award. (Oxenham v. Lemon, 2 D. & R. 461.)

Where all matters in difference are referred to an Award of arbitrator, an award directing the execution of mutual general regeneral releases closes all accounts between the parties up to the time of the submission. (Trimingham v. Trimingham, 4 N. & M. 786.) But where the generality of the words of a release, executed according to the directions of an award, might extend to a matter the parties did not intend the arbitrators to adjudicate upon, and upon which they did not adjudicate, the generality of the words will be restrained by the intention of the parties. (Upton v. Upton, 1 Dow. 400.)

Except the reference be under a statute giving an Award will award the effect of a conveyance, an award that one per- land, son shall convey land, or any interest in land, will not itself operate as a conveyance (Rolle, Ab. "Arb." A. 3; Marks v. Marriot, 1 Ld. Raym. 114; Henry v. Kirwan, 9 Ir. C. L. Rep., N. S. 459), or as a partition of lands between tenants in common (Johnson v. Wilson, Willes,

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248), but the arbitrator must direct the execution of conveyances.

or transfer a chattel.

The property in a chattel cannot be transferred by the mere force of an award. (*Hunter* v. *Rice*, 15 East, 100; *Thorpe* v. *Eyre*, 1 A. & E. 926.)

But an award may ascertain the right to any species of property, so as to give the party in whose favour it is made, a possessory remedy for the recovery of it; for if two persons submit to arbitration a dispute respecting the right to certain land, or other property, when the arbitrator ascertains to whom the property belongs, the parties are concluded by the award. (Doe d. Morris v. Rosser, 3 East, 15.)

Sum awarded creating a debt.

An award that one person shall pay to another a sum of money will create a debt from the one party to the other; the payment of which may be enforced by action or attachment. And a sum of money due upon an award is proveable in bankruptcy and is a good petitioning creditor's debt (Dawe v. Holdsworth, Peake, 64; Ex parte Lingood, 1 Atk. 240), unless the award be bad upon the face of it, or the submission be void. (Antram v. Chace, 15 East, 209; Dutton v. Morrison, 17 Ves. 193; Lee's Bankruptcy, 55.) And the sum awarded will carry interest from the day appointed for payment, which interest may be recovered by action, but not by attachment, or by including it in a judgment entered upon verdict in pursuance of an award.

An award as a plea to an action for same matter.

Where an action is brought for the same cause of action upon which an award has been made between the parties, the award is a good plea to the action. In order to give it in evidence as a defence the award must be pleaded specially. Where, during the progress of a cause, an award has been made in pursuance of a reference of the cause; but notwithstanding the cause is

carried down to trial, the award should be pleaded as a plea to the further continuance of the action. (Watson on Awards, 257.)

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Wherever accord and satisfaction would be a good defence an award may be pleaded. If A. have the custody of the cattle of B., and the cattle commit a trespass on the land of C., and A. and C. submit this trespass to arbitration, and an award is made; the award is a good plea to an action for the same trespass brought by C. against B. (Rolle, Ab. "Arb." B. 1.) And in an action brought against A., a plea by him of an award, for the same cause, between the plaintiff on the one side and A. and another jointly on the other side is a good plea. (Thomlinson v. Arriskin, Comyn, 328.) So an award made between one of several trespassers and the plaintiff, and performance, will bar an action against the others, for this is satisfaction. (Rolle, Ab. "Release," G. 2; Peytoe's Case, 9 Rep. 78.)

It has been decided that whenever the award gives a new duty in lieu of the former, or awards any collateral matter in satisfaction of the debt or grievance, it is not necessary in pleading the award to aver performance. (Gascoyne v. Edwards, 1 Y. & J. 19; Allen v. Harris, 1 Ld. Raym. 122; Freeman v. Bernard, 1 Salk. 69; Purslow v. Baily, 2 Ld. Raym. 1039.) But, where the award merely ascertains the amount of the debt, to an action for debt, an award is not a good plea without an allegation of performance. Thus, where to an action of assumpsit for 150l. for tolls, it was pleaded that differences respecting that claim had arisen between the plaintiff and defendant, and they had mutually agreed to refer the said matter to the award of an arbitrator, who made his award of and concerning the matter submitted to him, and thereby awarded that the defendant

CHAP. XV. should pay to the plaintiff 13%; this plea on demurrer was held bad without an averment of payment of the sum awarded. Lyndhurst, C. B., in delivering the judgment of the court, said: "The matter for the consideration of the arbitrator was whether there was any and what debt; the award only ascertains that there is a debt, specifies the amount, and directs payment, but the money until paid is due in respect of the original debt, i. e. for tolls; its character remains the same, nothing is done to vary its nature or destroy its original character;" and added that as the money payable under the award was nothing but the original debt so ascertained in amount, the plea was bad. (Allen v. Milner, 2 C. & J. 47.) It seems therefore that if the demand is for debt, and the award extinguish the right to have payment in money, plea of the award without alleging performance will be good.

> A plea except as to a certain sum, that an arbitrator had awarded that sum as the sum due in respect of the causes of action was held good. (Commings v. Heard, L. R., 4 Q. B. 669.)

An award as a plea to a bill in equity.

Where there is an award under an agreement to refer a suit to arbitration after bill filed, the award may be pleaded. (Sed vide Wood v. Rowe, 2 Bligh, 595.) But where all the parties to a suit were not parties to the award, and part of the prayer of the bill was for the execution of the trusts of a deed, under which some of the parties were interested who were not parties to the award: the plea of award was allowed to stand for an answer with liberty to except. (Dryden v. Robinson, 2 S. & S. 529.) To a bill to set aside an award, and open the account, the award may be pleaded (Pusey v. Desbouvrie, 3 P. Wms. 315; Lingood v. Eade, 2 Atk. 515); and such a plea is good

to a bill seeking to disturb the matter adjudicated upon CHAP. XV. by an arbitration. (Tittenson v. Peat, 3 Atk. 529.) But if fraud and partiality are charged against the arbitrators, those charges must not only be denied by way of averment in the plea, but the plea must be supported by an answer, showing the arbitrator to have been incorrupt and impartial; and any other matter stated in the bill as a ground for impeaching the award must be denied in the same manner. (Mitford's Pl. 304.) And it is now settled, that were a bill is filed to have an award set aside, on the ground of extrinsic circumstances, the award cannot alone be pleaded in bar of that prayer without specifically denying the charge of those circumstances, either in the plea or in a distinct answer. (Gartside v. Gartside, 3 Anst. 735; Butcher v. Cole, cited 1 Anst. 99; South Sea Co. v. Bumstead, 2 Eq. Ca. Ab. 80.)

A valid award, like the judgment of a competent An award as court of judicature, is conclusive evidence as between evidence. the parties to it upon all the matters included in it. (Sybray v. White, 1 M. & W. 435; Whitehead v. Tattersall, 1 A. & E. 491.) But it has no force as against strangers, for, unlike a verdict or judgment, it cannot be received as evidence in the nature of reputation. (Evans v. Rees, 10 A. & E. 151; Wenman v. Mackenzie, 5 E. & B. 447; 25 L. J., Q. B. 44.) On an indictment for not repairing a road, which it was alleged the defendant was bound to repair ratione tenuræ; an award made in pursuance of a submission by a former tenant, whereby it was awarded that the occupier of that farm and not the parish was bound to repair the road, was refused in evidence, since the landlord was no party to the submission, and it could not be

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received as evidence of reputation, for it was post litem motam. (R. v. Cotton, 3 Camp. 444; 1 Phillips on Evidence, 186, 195.)

An award is not evidence of an account stated between the parties to the submission (Bates v. Townley, 2 Exch. 152); unless perhaps in the single event of there being no regular agreement to refer, and consequently no award capable of being enforced in law. In such a case, as the arbitrator is not a judge, he might possibly be deemed the agent of the parties for the purpose of settling their accounts. (2 Taylor on Evidence, 1503; Keen v. Batshore, 1 Esp. 194.)

It has been held that an award is not admissible in evidence to establish the truth of the facts on which it is rendered, against a party to be affected by the proof of it in a criminal case. (R. v. Fontaine Moreau, 11 Q. B. 1028.)

Performance of an award.

Questions rarely arise as to what is and what is not a sufficient performance of an award, or what is a breach of performance of the particular award. Each party is bound to comply substantially with the directions of the award so far as regards himself, and a party seeking a remedy for non-performance must show that he has performed or tendered performance of all conditions precedent and concurrent acts on his part to be performed. Upon an award for the payment of money at a particular time and place, the party who is to pay ought to come and tender the money accordingly, even if the other party is not there to receive it. (Doyley  $\nabla$ . Burton, 1 Ld. Raym. 533.) If no time and place be mentioned, money awarded to be paid is payable on If the award be good in part and bad in part, it is sufficient to perform that part which is good.

in all cases a substantial compliance with the award is Chap. XV. sufficient. (Hanson v. Boothman, 13 East, 22; Doddington v. Bailward, 7 Dow. 640; Sharpe v. Hancock, 7 M. & G. 354.) The rule of performance cy près is applicable to awards as well as to agreements.

### CHAPTER XVI.

#### MAKING THE SUBMISSION A RULE OF COURT.

## SECT. 1.—A Rule of a Court of Law.

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A PRACTICE arose, first in the time of Charles II., of making the submission a rule of court, so as to render any misconduct under the submission, or any refusal to act on the award, a contempt of that court, and so give that court jurisdiction over the award and the parties to the submission; and this practice gave rise to the various enactments under which a court of law now has extensive powers over the reference. These powers. however, must be exercised by the court in a summary way; and the statutes neither take away any defence given by common law, nor enable a defendant in an action to set up any defence which he could not have so set up before. (39 L. J., Ex. 136.) And the summary powers of the court, whether to enforce or set aside an award, cannot be invoked until the submission is made a rule of court, except in the case of an award made in a compulsory reference under the C. L. P. Act, 1854, which the court has power to deal with by virtue of the statute, though the judge's order be not made a rule of court. (Bennett v. Watson, 29 L. J., Ex. 357.) We have previously noticed what submissions may be made rules of court (ante, pp. 21, 31, 37); and it may be sufficient to mention here that almost all submissions in writing may now be so made (C. L. P. Act, 1854,

Submission made a rule before proceedings on the award. s. 17); and that when a submission is by judge's CHAP. XVI. order or order of nisi prius, the courts have power to make such submission a rule of court by virtue of the inherent jurisdiction they possess over judicial proceedings before them.

The submission may be made a rule of court at any When to be time either before or after the award is made; and by made a rule. either party. (Pownall v. King, 6 Ves. 10; Fetherstone v. Cooper, 9 Ves. 67; Ross v. Ross, 16 L. J., Q. B. 138.)

It may be made a rule as well in vacation as in term time. (In re Taylor, 5 B. & A. 217.) The rule, if delivered out in vacation, must be dated on the day of the month and week on which it is delivered out, but should be entitled as of the term immediately preceding the vacation. (Reg. Gen. H. T., 1 Vict. c. 3.)

A submission is made a rule of court by motion. By motion This is a motion of course, only requiring counsel's signature, and is absolute in the first instance. notice need be given to the other side.

On making the submission a rule of court (unless Affidavit of where it is by judge's order or order of nisi prius), an affidavit must be produced of its execution. Though formerly, it is not now generally necessary that the execution should be verified by an affidavit of the attesting witness. (Newton v. Hetherington, 19 C. B., N. S. 342.) If the submission is signed by an agent, his authority must be shown. Therefore, on a reference between two individuals (not being partners in trade), and a third party, where the agreement is signed by one of them, thus, "A. for self, and B."—on making the submission a rule of court it must be shown by affidavit that A. had the authority of B. to sign for him. (In re Aldington, 15 C. B., N. S. 375.)

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Enlargements part of rule; If the time for making the award has been enlarged, and the award has been made within such enlarged time, it is necessary to make the enlargement, or all the enlargements if more than one, verified by affidavit, a rule of court before moving to enforce the award; though it seems this is not necessary before moving to set it aside. (Re Welsh, 1 Dow. N. S. 331; Gripe v. Wilkie, 20 W. R. 112.) In a reference by judge's order, and the arbitrator after twice enlarging the time had made his award, the Court of Queen's Bench held that the order of reference might be made a rule without an affidavit verifying the dates of such enlargements. (Roberts v. Evans, 34 L. J., Q. B. 73; 6 B. & S. 1.)

Where there was cause to believe that an arbitrator had failed to enlarge the time for making his award within the time provided by the order of reference, and he had refused to give any information as to whether the enlargement had been duly made or not, the court ordered the arbitrator to attend before the master to be examined upon the matter. (Roberts v. Evans, 34 L. J., Q. B. 7.)

appointment of umpire also.

In the case of an umpirage, the appointment of umpire should be made part of the rule. (In re Smith and Reeves, 5 Dow. 513.) The submission, the enlargements, and the appointment of umpire, are made a rule of court by one motion. (Ib.)

Copy of submission made a rule. When the submission or one part of it is in the possession of the party wishing to make it a rule of court, of course the original must be made a rule of court: when the submission is lost, or accidentally destroyed (Robinson v. Davis, 1 Stra. 526; Parker v. Bach, 17 C. B. 512), or when the arbitrator refuses to give it up without payment of an exorbitant fee (Thomas v. Philby, 2 Dow. 145), the court will allow a verified

copy to be made a rule of court. If the submission be CHAP. XVI. in the possession of the opposite party, the court will grant a rule calling on him to produce it, in order that it may be made a rule of court. (Ld. Boston v. Mesham, 8 Dow. 867.) If a submission be by two parts of a deed, one in the hands of each party, and the enlargement of time be endorsed only on the part in the hands of the opposite party, the court will compel that party to produce it in order that it may be made a rule of court. (In re Smith v. Blake, 8 Dow. 130.) As the submission belongs to both parties, when the one in whose possession it is refuses to produce it, the other should take out a summons, returnable at chambers, calling on him to show cause why the original submission should not be filed, with a view to its being made a rule of court; or if not, why a verified copy should not be filed for that purpose. (Bligh v. Cottall, 3 N. R. 117.)

When a cause is referred the costs of making the Costs. submission a rule of court are generally costs in the cause.

# Sect. 2.—A Rule of Chancery.

The application to make the submission a rule of How submisa court of equity is by motion: which must be on rule. notice, unless the submission provide that either party may make it an order of the court without notice to the other party; and the execution of the submission must be proved, unless the application is consented to. order will not be passed until the submission has been filed in the report office, and a note thereof made on the order by the clerk of reports. (2 Daniell's Ch. Pr. 1839, 4th edit.)

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When necessary to make the award a rule,

When a party seeks to enforce an award in equity, it as well as the submission, is sometimes made an order of court. It seems that when a reference is made by an order of the Court of Chancery, in a cause in that court, it is not necessary to make the award a rule of that court, before an order can be made founded on the arbitrators' directions. (Ormond v. Kynnersley, 2 S. & S. 15; Wood v. Taunton, 11 Beav. 449.) an award under 9 & 10 Will. 3, c. 15, according to the usual practice, must be made an order of court before proceedings can be taken to enforce it. This is done on motion with notice the same as in the case of a submission; and the award must be filed in the report office before the order is passed; and proceedings may then be taken upon it. (Daniell's Ch. Pr. 1842, 4th edit.)

### CHAPTER XVII.

#### SETTING ASIDE AN AWARD.

SECT. 1.—Grounds for setting aside an Award.

THE courts have only jurisdiction to set aside an award CHAP. XVII. on motion, when the submission can be made a rule of Jurisdiction court, or when the reference is compulsory under the of the courts. C. L. P. Act, 1854.

The courts of Westminster have no authority to set aside an award made in an action depending in the Common Pleas at Lancaster, and referred by order of nisi prius. (Plumley v. Isherwood, 12 M. & W. 190.) But in this case application may be made to any judge at chambers, all the judges being appointed judges of that court. (4 & 5 Will. 4, c. 62, s. 24; Byrne v. Fitzhugh, 5 Tyrw. 221.) In no other case has a judge at chambers power to set aside an award, but the application must be made in open court.

It may be necessary to premise at the outset, that in cases where a court of law has jurisdiction to set aside an award, if the application be made in due time, every ground of relief in equity against an award, is equally open in a court of law (R. v. Wheeler, 3 Burr. 1258): that in considering an award upon an application to set it aside, the court will make no distinction between legal and lay arbitrators, or treat the awards made by the one, in any manner differently from those made by the other (Jupp v. Grayson, 1 Cr. M. & R. 523;

CHAP. XVII. Huntig v. Ralling, 8 Dow. 879): that an award made in a matter referred under the compulsory clauses of the C. L. P. Act, 1854, can only be set aside upon the same grounds as an award upon a reference by consent. (Hogg v. Burgess, 27 L. J., Ex. 318; Holloway v. Francis, 9 C. B., N. S. 559.)

> The grounds upon which an award will be set aside may be conveniently considered under six heads.

1. The award uncertain, not final, &c.

1. Where the award is invalid, as not being certain, or final, or not embracing all matters submitted to the It has already been stated what awards are good and what bad, and it is sufficient here to say, that if an award be clearly bad, for matters apparent on the face of the award, or for matters extrinsic, as for not being certain, or final, or for an excess of authority in the arbitrator, or for the cause that all matters submitted have not been determined by the arbitrator, the court will set the award aside, in the whole, or in part, according to the circumstances of the case; but if the question whether the award be good or not be doubtful, the court will neither grant an attachment nor set aside the award, but leave the parties to discuss the question of the sufficiency of the award in an action, because, if set aside on motion, there is an end of it altogether, whereas if an action be brought, the question of its validity may be in general more formally raised, and taken to a court of error.

2. Mistake in law or fact.

2. Mistake of the arbitrator. In considering this branch of the subject it is necessary to recognize the distinction between a mistake as to jurisdiction, and a mistake on the merits within the jurisdiction. an award is good on the face of it, but the arbitrator has made a mistake either of law or fact, if that mistake has been as to a matter within the arbitrator's authority,

then, inasmuch as there is no court of appeal from the CHAP. XVII. arbitrator, the mistake cannot be remedied; nor can the court, even in the exercise of its equitable jurisdiction, set aside the award unless it can be shown that there was misconduct or some other equitable ground for interference. But if the mistake has been as to the extent and nature of the arbitrator's authority leading him to exceed it, then, inasmuch as an excess of authority by mistake, is just as much an excess as if it had been in consequence of a wilful disregard of the limits of the authority, the award may be impeached as being made without jurisdiction. (Buccleuch v. Metropolitan Board of Works, 39 L. J., Ex. 137, per Blackburn, J., Jones v. Corry, 5 Bing. N. C. 187.)

As to a mistake on matters within the arbitrator's jurisdiction, it may be laid down as a general rule, that the court will not set aside an award on the ground of mistake by the arbitrator on a question of law or of fact, unless the mistake appear upon the face of the award, or in some writing contemporaneous with, and intended to form part of it. (Kent v. Elstob, 3 East, 18; Sharman v. Bell, 5 M. & S. 504; Williams v. Jones, 5 M. & R. 3; Payne v. Massey, 9 Moore, 666.) Thus, where the amount due on a London apothecary's bill was referred, the court refused to allow the award to be impeached by affidavits showing that the arbitrator had included in the amount awarded certain illegal charges, as the objection did not appear on the face of the award. (Gensham v. Germain, 11 Moore, 1.) And the court refused to set aside an award where the arbitrator had allowed transactions apparently illegal, as premiums for an insurance to a hostile port, the legality of the ground of insurance being for the conCHAP. XVII. sideration of the arbitrator. (Wohlenberg v. Lageman, 6 Taunt. 251.)

It cannot be alleged as ground for setting aside an award that it is contrary to the evidence. (Re Bradshaw's Arbitration, 12 Q. B. 562.)

As an arbitrator is a judge voluntarily chosen by the parties to decide between them, they cannot object to his decision, whether in the form of an award or certificate (Price v. Price, 9 Dow. 334), that it is unreasonable, or a judgment against law (Baguley v. Markwick, 30 L. J., C. P. 342; 10 C. B., N. S. 61; Fuller v. Fenwick, 3 C. B. 705; Faviell v. Eastern Counties Rail. Co., 2 Ex. 344), or an erroneous judgment on the facts. (Morgan v. Mather, 2 Ves. 15.) The result of the cases is thus summarized by Williams, J., in Hodgkinson v. Fernie (3 C. B., N. S. 189), "The law has for many years been settled, and remains so to this day. that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and fact. Many cases have fully established that position, where awards have been attempted to be set aside on the ground of the admission of an incompetent witness, or the rejection of a competent one. The court has invariably met those applications by saying, 'You have constituted your own tribunal, you are bound by its decision.' The only exceptions to that rule, are, cases where the award is the result of corruption or fraud, and the one other, which, though it is to be regretted, is now I think firmly established, namely, where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be CHAP XVIL considered as established."

If an arbitrator is silent in his award as to his law, the court cannot interfere though he be wrong. (Bouttilier v. Thick, 1 D. & R. 366.) Where he professes to decide according to law, but does not do so, if the mistake appear on the face of the award, or is disclosed by some contemporaneous writing, the court will set it aside. (Hogge v. Burgess, 3 H. & N. 293; per Watson, B.) But if the award be good on the face of it, the court will not admit an affidavit or after-written letter of the arbitrator to show that the arbitrator was mistaken in fact or law (Holgate v. Killick, 7 H. & N. 418; Brown v. Nelson, 13 M. & W. 397); nor even a contemporaneously written letter, unless such letter substantially forms part of the award, and was intended Thus, where an award was accompanied by a letter from the arbitrator to one of the parties only, stating that he had not made any award as to the costs because he considered he had no power to do so, the award being good on the face of it, the court refused to look at the letter, as it did not form part of the award. (Leggo v. Young, 16 C. B. 626.)

Where a gross mistake is made by an arbitrator, though not apparent on the face of the award, the court will sometimes set aside the award as for misconduct of the arbitrator; as where A. claiming two sums to be due to him from B., the contention before the arbitrator is merely whether A. is entitled to both or only one of those sums, and the arbitrator, meaning to give A. both sums, instead of adding them together, deducts the smaller from the larger, and instead of directing the payment to be made by B. to A., awards that the payment shall be made by A. to B. (In re Hall and

CHAP. XVII. Hinds, 2 M. & G. 847; Ashton v. Pointer, 2 Dow. 651; and see Flynn v. Robertson, 38 L. J., C. P. 240.)

> The decisions on the power of the court to set aside an award for a mistake by the arbitrator are now of less importance than formerly, for the court having power in all cases to remit the award to the arbitrator for his reconsideration, it is conceived that no award will now be set aside for any defect which the arbitrator could cure. but that in all such cases it will be remitted to him.

- 3. Irregularity in the proceedings.
- 3. Irregularity in the proceedings, such as want of notice of the meetings, or improper conduct of the arbitrator in receiving evidence. These points have been already fully considered (ante, Chap. X.).
- 4. Corruption in the arbitrator.
- 4. Corruption or misbehaviour of the arbitrator, or a secret interest in the matters referred (ante, Chap. IX.). It is seldom at the present day that any actual corruption or fraud is to be found in the conduct of arbitrators, but there may be ample misconduct in a legal sense when there is no moral culpability. (In re Hall and Hinds, 2 M. & G. 847.)
- 5. Concealment of evidence by the parties.
- 5. An award will be set aside when it appears that one party has obtained the decision in his favour by fraud or concealment of material circumstances, such as would, if disclosed to the arbitrator, have altered his judgment. (South Sea Company v. Bumstead, 2 Eq. Ca. Ab. 80; Medcalfe v. Ives, 1 Atk. 63.) But an award will not be set aside, or referred back to the arbitrator, on the ground of the discovery of fresh evidence since the award, unless it be stated that it is evidence which reasonable diligence could not have obtained before the arbitrator made his award. (Eardley v. Otley, 2 Chit. 42; Reynolds v. Askew, 5 Dow. 682.) The court refused to set aside an award where it ap-

peared that the arbitrator having power to examine the CHAP. XVIL parties, had examined one of the parties who it was afterwards discovered had been transported, and had returned from transportation before the expiration of his term (and then incompetent as a witness), it appearing from the arbitrator's statement that he had excluded from his judgment the testimony of both parties as unworthy of credit. (Smith v. Sainsbury, 9 Bing. 31.) In Pilmore v. Hood (8 Dow. 21) the court refused to set aside an award on the ground that the arbitrator had been misled by the evidence of a witness, who might have been cross-examined and was not. It is no ground for setting aside an award that the unsuccessful party suffered a surprise, as an arbitratar would have power to postpone the proceedings upon any reasonable application for that purpose. (Solomon v. Solomon, 28 L. J., Ex. 129.)

The court will not set aside an award although the Fraud and affidavit in support of the application disclose strong perjury. imputations upon the testimony of a material witness who was examined before the arbitrator. (Scales v. East London Waterworks Co., 1 Hodg. 91.) Nor will the court set aside an award on the ground that the order of reference has been fraudulently obtained; the application ought to be to set aside the order of reference, and should be made within due time after the order was obtained. (Sackett v. Owen, 2 Chit. 39.)

6. If an award be void, the court will not on that 6. When void ground set it aside, if nothing can be done upon it with- aside. out suit or application to the court; but if the party can enforce it without applying to the court to enable him to do so, as, for instance, if the award order a verdict to be entered, the court will set it aside, though the submission has been revoked, since otherwise the party

CHAP. XVII. might proceed to judgment and execution upon it. (Doe d. Turnbull v. Brown, 5 B. & C. 384.)

## SECT. 2.— Time limited for Moving to set aside an Award.

9 & 10 Will. 3, c. 15.

It is enacted by 9 & 10 Will. 3, c. 15, s. 2, "That any arbitration or umpirage procured by corruption or undue means [or bad from any other cause whatever, (Zachary v. Shepherd, 2 T. R. 781)] shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties."

Submissions within the statute.

A submission must be in writing and contain an express agreement enabling the parties to make it a rule of court to bring the award within this act. (Smith v. Whitmore, 33 L. J., Ch. 218.) It does not extend to awards where the reference has been by order of nisi prius (Synge v. Jervoise, 8 East, 466; Lucas v. Wilson, 2 Burr. 701); nor to other cases where an action is pending in one of the superior courts and the reference has been by rule of court. (Rogers v. Dallimore, 6 Taunt. 111.) In such cases the statutable limitation of time does not necessarily apply. But where a cause is referred by agreement out of court, with a provision enabling the parties to make the submission a rule of court, it is a reference within the statute. (Rushworth v. Barron, 3 Dow. 317.) So where a cause is referred by judge's order with power to make it a rule of another court.

If the award be made in vacation, an application CHAP. XVII. within this act to set it aside must be made before the Time allowed last day of the next term; but if the award be made in under the statute. term, the parties have until the last day of the following term to make the application. (In re Burt, 5 B. & C. 668; Allenby v. Proudlock, 4 Dow. 54.) The limitation as to time being express, an application cannot be made afterwards, not even on the last day of term (Freame v. Pinneger, 1 Cowp. 23): and an application on the last day but one of the term, for leave to move on the last day of the term to set aside an award, on the ground that the affidavits on which the motion was to be founded had not arrived from the country, was re-(In re Evans, 4 M. & G. 767; Ross v. Ross, 16 L. J., Q. B. 138; but see Re Midland Rail. Co. and Hemming, 4 D. & L. 788.) And where a rule under the statute to set aside an award was obtained in due time, Littledale, J., refused to allow it to be amended by drawing it up on reading an additional affidavit made on the last day of the term next after the award. (Holloway v. Monk, 8 Dow. 138.)

In one instance, in equity, a motion was allowed to be made for setting aside an award after the expiration of the statutable limit (Harvey v. Shelton, 7 Beav. 455), but the authority of that case seems doubtful; and in a recent case, the Court of Common Pleas decided, that after the lapse of two terms from the making of the award, a motion to set it aside cannot be made even by consent of the parties. (In re North British Rail. Co., 35 L. J., C. P. 262; L. R., 1 C. P. 401.) It seems well established that, in cases within the statute, the courts will not (even if they have the power, which according to the better opinion they have not), after the time above mentioned, entertain a motion to set aside an award on any

CHAP. XVII. account whatever (Pedley v. Goddard, 7 T. R. 73; Reynolds v. Askew, 5 Dow. 682), even for objections appearing on the face of the award (Loundes v. Loundes, 1 East, 276); and even although a portion of the delay was caused by the opposite party improperly preventing the submission being made a rule of court (Smith v. Blake, 8 Dow. 133); or by the party not knowing the contents of the award, owing to the arbitrators refusing to give it up until they were paid excessive fees. (Moore v. Darley, 1 C. B. 445.) If however any attempt be made to enforce the award, by attachment, the application may be resisted at any time whatever, for defects appearing on the face of the award.

From when time runs.

Time for setting aside the award begins to run from the day the award is published to the parties; that is, from the day notice of it is given to the parties, and not, on the one hand, from the time it is made, or, on the other, from the time it is actually delivered. (Macarthur v. Campbell, 5 B. & Ad. 518, dissenting from Musselbrook v. Dunkin, 9 Bing. 605, where the Court of Common Pleas considered that an award was only published within the statute when the party might have it by paying a reasonable amount for the arbitrator's charges.)

Limitation of time in reference at nisi prius of the cause only.

Where the reference is by rule of nisi prius, and of the cause only, or of matters in difference in the cause, as the arbitrator is then considered to be thereby put in the place of a jury, the application to set aside the award is treated as an application for a new trial, and should consequently be made within the first four days of the term next ensuing the publication of the award (Riccard v. Kingdon, 3 D. & L. 773; Lyng v. Sutton, 3 Scott, 187; O'Toole v. Pott, 26 L. J., Q. B. 88; 7 E. & B. 102); or if published in term, within four

days after publication. (Paxton v. Great North of CHAP. XVII. England Rail. Co., 8 Q. B. 938; Allenby v. Proudlock, 4 Dow. 54.) And this rule applies whether the arbitrator has to decide on the question who is entitled to the verdict, or to ascertain the amount of damages (Thompson v. Jennings, 10 Moore, 110); and although the objections are apparent on the face of the award. (Sell v. Carter, 2 Dow. 245.) Where the arbitrator ordered a verdict to be entered for 2501., and then stated certain facts for the opinion of the court, and directed that, if the court should be of opinion on these facts the verdict should be for £125 only, the damages should be reduced to that sum; the court held that a motion to enter a verdict for the smaller sum must be made within the time for moving to set aside the award. for as the arbitrator had awarded for the larger sum, the motion in substance was to set aside the award. (Anderson v. Fuller, 4 M. & W. 470.)

If a cause and other matters in difference out of the Reference of cause are referred at nisi prius, an application to set matters in aside the award is in time if made before the last day of difference. the next term after the publication of the same (Hayward v. Phillips, 6 A. & E. 119); and athough there are in fact no matters in difference out of the cause, for the submission and not the award fixes the limit. (Moore v. Butlin, 7 A. & E. 595.)

When either a cause, or a cause and all matters in Limitation difference, are referred at a stage earlier than the trial before trial. at nisi prius, by judge's order or rule of court, application to set aside the award is generally by analogy to the statute required to be made before the last day of the next term after the publishing of the award. (Potter v. Newman, 4 Dow. 504; Brooke v. Mitchell, 6 M. & W. 473.)

CHAP. XVII. further time

to move.

In cases not within the statute (9 & 10 Will, 3, c. 15, Power to allow s. 2), whether the prescribed limit be that founded on analogy to the statute, or that adopted from analogy to a verdict, the courts, in the exercise of their discretion, will allow further time for motions provided very clear and sufficient reasons be given for the delay. thorn v. Arnold, 6 B. & C. 629; Hemsworth v. Brian, 7 M. & G. 1009; Reynolds v. Askew, 5 Dow. 682.) Therefore, where a rule was obtained in time but discharged on grounds purely technical, the court granted a new rule in the second term after the publication. (Sherry v. Oke, 3 Dow. 349.) So the court entertained a motion after the time had elapsed, when it was impossible for the attorney to get counsel's opinion as to the validity of the award within the four days from publication (Bennett v. Shardon, 5 M. & R. 10); and likewise when counsel had been instructed to move within the proper time, but for some cause failed to do so. (Rogers v. Dallimore, 6 Taunt. 111.) So also where on a reference by a judge's order, the defendant, in whose favour the award was, improperly kept the order of reference from the plaintiff and prevented it being made a rule of court until too late. (Bottomley v. Buckley, 4 D. & L. 157.)

> But the courts usually require a strong case to justify their departure from the ordinary practice, and it has been held not to be sufficient excuse for lateness that the arbitrator refused to give up his award without payment of an exorbitant sum (Macarthur v. Campbell, 5 B. & Ad. 518); or that the party moving did not believe that the other party intended to proceed upon the award, as there had been a previous revocation (Worrall v. Deane, 2 Dow. 261); or that he was misled by a statement of the other party, that the latter intended

to move to set the award aside (Emet v. Ogden, 7 Bing. CHAP. XVII. 258); or that the applicant was in ill health and unable to attend to business (Guadiano v. Brown, 2 Jur., N. S. 358); or that the applicant was an assignee of one of the parties to the reference, who had become insolvent, and that he was only appointed a short time before coming to court. (Hobbs v. Ferrars, 8 Dow. 779.)

The C. L. P. Act, 1854, s. 9, provides, that "All Limit on applications to set aside any award made on a compul- compalsory reference. sory reference under this act shall and may be made within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term; and if no such application is made or if no rule is granted thereon, or if any rule granted thereon is afterwards discharged, such award shall be final between the parties." This section does not require that the rule shall be granted within the seven days, but only that it shall be moved for within (Bennett v. Watson, 5 H. & N. 831; 29 L. that time. J., Ex. 357.)

The above limitations as to time do not apply to an Time for movapplication to set aside a judgment entered up in pursu- ing to set aside ance of an award. (Brooks v. Parsons, 1 D. & L. 691; Wilcox v. Wilcox, 19 L. J., Ex. 27.) A motion to set aside judgment may be made after execution has issued, and even after it has been executed. (Manser v. Heaver, 3 B. & Ad. 295.) It may be made whether the defendant has omitted to move to set aside the award itself, or having applied has had his rule discharged. (Wrightson v. Bywater, 3 M. & W. 199.) It may be founded on the same alleged defects, apparent on the award, on which a motion to set aside the award has been refused. It is in general better to apply in proper time to set aside the award itself, for on a motion

CHAP. XVII. to set aside the judgment entered on it, only such defects as appear on the face of the award and would be available in answer to a motion for attachment for disobeying it, can be taken advantage of. (Doe d. Madkins v. Horner, 8 A. & E. 235.)

SECT. 3.—Application and Proceedings thereon.

Mode of application. The mode of applying to set aside an award is, after the submission has been made a rule of court, to move for a rule to show cause why the award should not be set aside, upon an affidavit verifying the award or a copy thereof and stating the facts necessary to sustain the objections intended to be made. (2 Chit. Arch. 1688, 12th ed.) The motion may not be made on the last day of term.

Affidavits.

Where a cause is in court, the affidavits pro and conshould be entitled in the cause. Where there is no cause in court, the affidavits need only be entitled in the court in which the application is made, though there is no objection to entitling them, "In the matter of," &c. And in such a case, adding the words plaintiff and defendant to the names of the parties in the title of the affidavit does not vitiate the affidavit. (Re Imeson and Horner, 8 Dow. 651.)

If the objections appear on the face of the award, no other affidavit than that of the due execution of the award will be required. It is not necessary that there should be an affidavit of one of the attesting witnesses to the award of its execution. (*England v. Davison*, 9 Dow. 1052.) An affidavit verifying a copy of the award to be a true copy need not state that the copy has been compared with the original award. (*Hawk*-

gard v. Stocks, 2 D. & L. 936.) And an affidavit has CHAP. XVII. been held sufficient which stated, that the paper writing produced was delivered personally into the hands of the deponent as a copy of the award. (Lund v. Hudson, 1 D. & L. 236.) And the same was held where the affidavit stated that the paper writing annexed was, or contained, as deponent believed, a true copy of the award, deponent having been served with the same by the attorney for the other side. (Hayward v. Phillips, 6 A. & E. 119.) If there are pleadings and it is necessary the court should look into them, a copy thereof should also be verified. (Allen v. Lowe, 4 Q. B. 66.) And if the award omit matters, the affidavit should set forth such matters, and allege that they were discussed before (Hancock v. Reed, 15 Jur. 1036.) the arbitrator.

The courts will not generally, after a rule has been Second appliobtained and discharged, grant another rule on a sugges- aside award. tion of fresh objections. (Hellyer v. Snook, 2 Chit. 265; R. v. Great Western Rail. Co., 1 D. & L. 874; but see Sherry v. Oke, 3 Dow. 349.)

It seems that a party in whose favour a mistake has Who may been made cannot avail himself of it to set aside the aside an Therefore, where an arbitrator erroneously award. found a plea of set off in part for the plaintiff and in part for the defendant, instead of wholly for the plaintiff, the court refused to set aside the award at the instance of the defendant; and as they had no power to amend, they gave the plaintiff the option, either of having the award set aside, or letting it stand if he were willing to pay the defendant's costs on the issue erroneously found in his favour, the merits not being affected and the order of nisi prius precluding a writ of error. (Moore v. Butlin, 2 N. & P. 436; Ward v. Dean, 3 B. & Ad. 234.) In certain cases acquiescence in the award, as

CHAP. XVII. taking a benefit under it, has been held to debar a party from moving to set it aside. Thus, where a party had received the costs of the reference, and of the award, which by the terms of the rule of reference were to be paid to him, the Court of King's Bench refused, on the application of that party, to grant a rule nisi to set aside the award. (Kennard v. Harris, 2 B. & C. 801.) But requesting time for a week to pay the money awarded, and attending the taxation of costs, is not such an acquiescence as to prevent the party from afterwards moving to set the award aside. (Hayward v. Phillips, 6 A. & E. 119.)

> A clause in the submission prohibiting the parties from bringing any action or suit respecting the matters referred, does not preclude a motion to set aside the award. (In re Mackay, 2 A. & E. 356.)

Drawing up the rule nisi.

The rule nisi for setting aside an award should be drawn up on reading the rule of court embodying the submission, the affidavits on which the motion is founded, and also a copy of the award (Sherry v. Oke, 3 Dow, 349; Barton v. Ransom, 5 Dow. 597), unless the award is void for matters extrinsic. Where the motion was on the ground that two arbitrators had made the award without the knowledge of the third, the court held that the party was not bound to take up an useless award which he was seeking to set aside. (Hinton v. Meade, 24 L. J., Ex. 140.)

Stating grounds of motion on the rule.

By rule 169, H. T. 1853, "Where a rule to show cause is obtained to set aside an award, the several objections thereto intended to be insisted upon at the time of moving to make such a rule absolute shall be stated in the rule to show cause." This rule also applies where the arbitrator has merely a certificate and not an award to make. (Carmichael v. Houchen, 3 N. & M.

203.) It has been held, however, that where the grounds CHAP. XVII. of the motion to set aside an award are not specified, the court may amend the rule in that respect. (Whatley  $\nabla$ . Morland, 2 C. & M. 347.)

The objections stated in the rule must be specific and Statement not general. (Staples v. Hay, 1 D. & L. 711.) Thus, not general. it has been held that it is not sufficient compliance with the rule of court to state in the rule nisi, that the arbitrator has exceeded his authority, or that the award is uncertain, or not final (Boodle v. Davies, 3 A. & E. 200); or "that the arbitrator has not by his said award raised the points of law, which on the part of the plaintiff he was requested to raise" (Bradbee v. Christ's Hospital, 4 M. & G. 714); or that the arbitrator has made his award "under a misapprehension of the terms of the reference" (Allenby v. Proudlock, 4 Dow. 54), or But the generality of the statement in the rule may be aided by the specific instances pointed out in the affidavits, so that where the rule expressed as the ground of moving, that the arbitrator had not decided all matters in difference; and the affidavit, whereon the rule was granted, specified the particular matters in difference not decided by the arbitrator: it was held that, coupling the affidavit and the rule together, the above rule of court had been complied with. thorn v. Arnold, 6 B. & C. 629.) So a statement "that the arbitrator had not awarded on a matter in difference submitted to him," as a ground of objection, coupled with an affidavit indicating the matter in difference, was held sufficiently specific. (Dunn v. Warlters, 9 M. & W. 293.) The effect of a ground of objection being too general is merely to prevent the party taking advantage of it; it does not hinder him relying on other grounds of objection, which are sufficiently stated.

CHAP. XVII. v. Davies, 3 A. & E. 200; Gray v. Leaf, 8 Dow. 654.)

In moving to set aside a judgment, entered up in pursuance of an award, for defects apparent on the face of the award, the objections need not be stated in the rule to show cause. (*Manser v. Heaver*, 3 B. & Ad. 295.)

Showing cause.

In general the courts will not allow cause to be shown against a rule to set aside an award on the last day of term, but the same is enlarged until the next term. (R. M. 36 Geo. 3, K. B.; Bignall v. Gale, 2 M. & G. 364.) But the case of Phillips v. Evans (12 M. & W. 309) was heard and decided in the Exchequer on the last day of term. The party showing cause should take an office copy of the affidavits on which the rule has been obtained, but not necessarily of the award or other exhibits. (Hawkyard v. Greenwood, 14 L. J., Q. B. 236.) In showing cause the party may produce affidavits to deny or explain away the matters of fact alleged as the grounds of motion; or if the imputation be of a defect in law he may support the sufficiency of the award by argument, so as at least to render it doubtful whether the award be bad, and if he succeed so far, the court will not set it aside. (Cock v. Gent, 13 M. & W. 364.) On showing cause the arbitrator's notes ought not to be referred to (Doe d. Haxby v. Preston, 3 D. & L. 768); but the original agreement of reference may be. (Oswald v. Grey, 24 L. J., Q. B. 69.)

Result of the motion.

After cause has been shown, the court usually either discharges the rule or makes it absolute; though in one case, the rule was enlarged to the following term to allow the parties to file fresh affidavits, that the facts might be fully stated. (Little v. Newton, 2 M. & G.

351.) If the award is good in part and bad in part, CHAP. XVII. and the latter can be separated without prejudice to the rest of the award, that part will be rejected; but the court will not make absolute the rule to set aside that part, but discharge the rule generally. (Re Goddard and Mansfield, 1 L. M. & P. 25.) An award will not be set aside on motion unless it is clearly void. (Cock v. Gent, 13 M. & W. 364, n.)

In general, where the courts discharge a rule nisi for Costs of the setting aside an award, they will do so with costs ( Snook v. Hellyer, 2 Chit. 43); but sometimes they will do so without costs. Where the defendant put a wrong construction on an award, which induced the plaintiff to move the court to set it aside, the court held that the defendant's construction was untenable, and therefore discharged the plaintiff's rule, and would not give him the costs of the motion. (Hocken v. Grenfell, 6 Dow. 250.) When a rule for setting aside an award on a cause is discharged, and nothing is said about the costs of the motion, they will be costs in the cause. (Clarke v. Owen, 2 H. & W. 324.)

SECT. 4.—Relieving against an Award in Equity.

Whenever a submission is made a rule of the Court Motion. of Chancery, motions may be made in that court, in the same manner, and for the same causes, to set aside awards, as in the courts of law. If the reference be by order of the Court of Chancery made in a suit depending in that court, or if it be under the statute 9 & 10 Will. 3, c. 15, and is or may be made a rule of chancery under the statute, proceeding by motion is the proper course. Notice of the motion must be served

CHAP. XVII. on the other parties, and on the arbitrators. (2 Danl. Ch. Pr. 1842.) It is not necessary, or usual, that the notice of motion should state the grounds on which it is sought to impeach the award. No appeal lies to the House of Lords from an order of the Court of Chancery made respecting an award, where the submission has been made a rule of the Court of Chancery under the statute, and no bill has been filed. (O'Sullivan v. Hutchins, 7 Cl. & F. 85, n.)

Bill, when it lies to relieve against an award.

Courts of equity have also extensive powers of relieving against awards by bill. Thus, they will relieve against an award made under a submission which cannot be made a rule of court. (Hamilton v. Bankin, 3 De G. & Sm. 782.) And it is no objection to a bill for relief in equity against an award, that the submission was by rule or order of another court, provided such rule or order was not made under the statute 9 & 10 Will. 3, c. 15. (Lord Lonsdale v. Littledale, 2 Ves. jun. 451; but see Harding v. Wickham, 2 J. & H. 676.) But where an action is referred by an order at nisi prius, the Court of Chancery has no jurisdiction to interfere with the certificate of the reference, or the iudgment entered pursuant thereto, on any ground on which it would not have such jurisdiction if the judgment had been obtained in the ordinary course upon the verdict of a jury. (Chuck v. Cremer, 2 Ph. 477; 17 L. J., Ch. 287.)

When not.

Where the submission is made a rule of court under 9 & 10 Will. 3, c. 15, it seems to be clear that a bill in equity cannot be filed to set aside an award, for the words of that statute are express, that process to enforce performance of awards within the statute shall not be hindered or delayed by the process of any other court whatsoever; which, as observed by Lord Eldon, means,

"If the reference is within the statute the legislature CHAP. XVII. has declared that a court of equity shall have nothing to do with it." (Nichols v. Chalie, 14 Ves. 265; Auriol v. Smith, 1 T. & R. 121; Steff v. Andrews, 2 Mad. 6.) Nor can a party have relief by bill in equity against an award where the parties have agreed that the submission may be made a rule of court, although the submission has not been made a rule of court at the time of filing the bill. (Davis v. Getty, 1 S. & S. 411; Dawson v. Sadler, 1 S. & S. 537; Nichols v. Roe, 3 M. & K. 431; Heming v. Swinnerton, 16 L. J., Ch. 90.)

We have previously noticed in what cases an arbitrator may be made a party to a bill impeaching the award (ante, p. 81).

## CHAPTER XVIII.

#### ENFORCING AN AWARD.

# SECT. 1.—By Attachment.

Attachment lies when submission can be made a rule of

court.

CHAP. XVIII. WHERE a submission has been made a rule of court, and a party wilfully neglects to obey the award, he is guilty of a contempt of such court, which will grant an attachment (the punishment for contempt) against him, whether the award be for the payment of money, or for the performance of some other act. (Doddington v. Hudson, 8 Moore, 510.) Whenever a submission can be made a rule of court, the performance of the award can be enforced by attachment. But when a submission cannot be made a rule of court (as when it is by parol, or by agreement negativing its being so made), an attachment for non-performance cannot be granted. But it has been held that, where a submission can be made a rule of court, an attachment may be granted though the award be parol. (Rawling v. Wood, Barnes, 54.)

In what cases an attachment will be granted.

An attachment will be granted for non-payment of costs awarded. (But see Grundy v. Wilson, 7 Taunt. 699.) Where one party has paid the whole of the costs of an award, which were payable partly by the opposite side, to get the award from the arbitrator, the courts will grant an attachment at the instance of the party who has paid the costs, against the other party for not contributing his share of such costs. (Hicks v. Richardson, 1 B. & P. 93; Stokes v. Lewis, 2 Smith, 12.) CHAP. XVIII. The payment of interest accruing due after the date of the award, cannot be enforced by attachment but only by action. (Churcher v. Stringer, 2 B. & Ad. 777.) Where a party has done all in his power to obey the award, the court will not grant an attachment against him. (Dodington v. Bailward, 7 Scott, 733.) Nor will they do so if it be doubtful whether the award is a good one (Tattersall v. Parkinson, 2 Exch. 342); or if a set off has arisen since the award (Rees v. Rees, 25 L. J., Q. B. 352); or where there has not been a performance, or tender of performance, of all conditions precedent, or concurrent acts, awarded to be done by the party applying for the attachment. (Standley v. Hemmington, 6 Taunt. 561.) So an attachment will be refused after a long delay unless such delay is satisfactorily accounted for. (Storey v. Garrey, 8 Dow. 299; but see Baily v. Curling, 20 L. J., Q. B. 235.)

It is perfectly discretionary with the courts in all cases whether or not, they will grant an attachment for the non-performance of an award, or leave the applicant to his remedy by action. (Stork v. De Smeth, Hardw. 106.) An attachment will not be granted unless the No attachment award contain a distinct order to do the act, the omis- award is dission of which, forms the ground of the application. (Graham v. Darcey, 6 C. B. 537.) Therefore, where an arbitrator finds by his award that a certain sum is due from the one party to the other, but gives no express order for the payment of that sum, an attachment will be refused for non-payment. (Seaward v. Howey, 7 Dow. 318.) Ordering a verdict to be entered for a certain sum, when the arbitrator has no authority to do so, cannot be treated as an order to pay that sum,

CHAP. XVIII. so as to support an attachment. (Donlan v. Brett, 4 N. & M. 854.)

Nor when the award is bad or doubtful.

If an award be bad, and the defects are apparent on the face of it, the courts will not grant an attachment. Even if it be doubtful whether the award be good or not the court will not go into the question on showing cause against an attachment, but will leave the party to his action to enforce performance of the award. (Cargey v. Aitcheson, 2 D. & R. 222; Perry v. Nicholson, 1 Burr. 278; Jackson v. Clarke, M'Cl. & Y. 200.) Thus, where the defendant was described by a wrong christian name in an award directing him to pay a sum of money, the court refused to grant an attachment. (Davies v. Pratt, 16 C. B. 586; Lees v. Hartley, 8 Dow. 883.) And where the parties agreed to abide by the award made by the "two arbitrators and their umpire," and the award was made by the two arbitrators only, the objection being taken that all three ought to have executed it: the court considered the point too doubtful to grant an attachment. (Heatherington v. Robinson, 7 Dow. 192.)

An attachment will not be granted for not making a payment on a Sunday. (*Hobdell* v. *Miller*, 2 Scott, N. R. 163.)

In one case, under peculiar circumstances, the court made a rule absolute for an attachment for non-payment of a sum awarded to the wife of one of the parties, although by collusion payment of the sum had been made to the husband. (Wynne v. Wynne, 3 Scott, N. R. 442; 1 Dow. N. S. 723.)

The attachment may be applied for before the time has elapsed for moving to set aside the award. (O'Toole v. Pott, 26 L. J., Q. B. 88.)

The court will not grant an attachment pending a CHAP. XVIII. rule for setting aside the award. (Dalling v. Matchett, No attachment Willes, 215.) And as the courts will not permit sepa- temporaneous rate contemporaneous proceedings for the same matter. proceedings. an attachment will not be granted pending an action on the award. (Badley v. Loveday, 1 B. & P. 81.) If the party was not in contempt at the time the action was brought, for example, if no demand was made until after that time, the rule will be discharged with costs. (Baker v. Wells, 9 Dow. 323; Higgins v. Willes, 3 M. & R. 382.) But if he was in contempt at that time an attachment will be granted on the terms of discontinuing the action and paying the costs. (Paull v. Paull, 2 Dow. 340.) But both proceedings will not be permitted; and where a party obtained an attachment to enforce an award, and afterwards proceeded by action the court set aside the attachment upon the terms of the defendant giving a bond to the plaintiff with sureties to the master's satisfaction, and conditioned to the same effect as in the case of a recognizance of bail. (Lonsdale v. Whinnay, 3 Dow. 263.) The court, however, have granted an attachment, pending a foreign attachment in London upon the same award. (Coppell v. Smith, 4 T. R. 313, n.) And imprisonment under an attachment is no satisfaction of the award, but the party remains liable to an action upon it, at least where his refusal to perform the award is wilful. (R. v. Hemsworth, 3 C. B. 745.)

An attachment will not be granted in favour of a In whose person not a party to the reference, but to whom money favour an attachment lies. is by the award ordered to be paid. (In re Sheete, 7 Dow. 618; Dunn v. West, 10 C. B. 420.) Nor even on behalf of an executor or administrator of a party who died after the award made, and to whom the money

CHAP. XVIII. awarded was to have been paid (R. v. Maffey, 1 Dow. 538); except, perhaps, where the award directed the money to be paid to the party or his executors. v. Stanton, 7 Taunt. 576.)

Who liable to be attached.

An attachment being in the nature of a civil process, it cannot be executed on a Sunday. (R. v. Myers, 1 T. R. 265.) An attachment will not be granted against a peer (Walker v. Earl Grosvenor, 7 T. R. 171), or a member of the House of Commons (Catmur v. Knatchbull, ib. 448); nor against the executor or administrator of the party by whom the money was to be paid or the act done. (Newton v. Walker, Willes, 315; and see Lewin v. Holbrook, 11 M. & W. 110.) But where an executor or administrator submits disputes in that character to arbitration, he will be liable to an attachment for non-performance of the award. (Spivy v. Webster, 2 Dow. 46; In re Joseph and Webster, 1 R. & M. 496.) The court will not grant an attachment against a party to an action which was referred without his consent, and who did not authorize the action or the reference, and had no notice of it until after the award. (Robertson v. Hatton, 26 L. J., Ex. 293.) Nor will an attachment lie against a corporation, or against its individual members, for the non-performance of an award. (Guilford v. Mills, 2 Keb. 1; Mackenzie v. Sligo and Shannon Rail. Co., 9 C. B. 250; London v. Lynn, 1 W. Bl. 205; Grant on Corp. 284.) Where a public company was authorized by statute to sue and be sued in the name of their treasurer, who was not to be liable in his person or goods by reason of his being defendant; the treasurer being party to an action which was referred, was directed by the award to pay a sum of money: the court directed a mandamus to the treasurer and directors of the company to pay the money so

awarded. (R. v. St. Katharine Dock Co., 4 B. & Ad. CHAP. XVIII. 360.) It was also held in the same case that as the defendant was not rendered personally liable by the act of parliament, an attachment could not issue against him for non-payment of the money awarded. (Corpe v. Glyn, 3 B. & Ad. 801.) Where a feme sole having agreed to a reference was awarded to deliver up two notes, and pay a sum of money; she married, and the husband refusing to pay: it was doubted if the court could grant an attachment against both or either of (Anon., 1 Cromp. 270, 3rd ed.) But an attachment will be granted against one of several of the parties against whom the award is made (Richmond v. Parkinson, 3 Dow. 703); or against a party residing out of the jurisdiction of the court. (Hopcraft v. Fermor, 8 Moore, 424.)

In order to enforce the award by attachment the submission must first be made a rule of court, for the courts have no jurisdiction until that is done. (Hilton v. Hopwood, 1 Marsh. 66; Mayor of Bath v. Pinch, 4 Scott, 299.)

A copy—which must be a correct one—of the rule Personal making the submission a rule of court (Smith v. Cal-service of rule, award, &c. vert, 2 Dow. 276) and of the award, must be personally necessary. served upon the party who has to perform the award. (Thomas v. Rawlings, 28 L. J., Ex. 347.) Where the matter to be performed is the payment of costs which have been taxed, a copy of the master's allocatur must be served at the same time. (Bass v. Maitland, 8 Moore, 44.) When the demand of performance of the award is made by an agent, a copy of the power of attorney must also be served. Tendering the documents, and leaving them by the party, is sufficient service, though he refuse to take them up. (Ellis v.

CHAP. XVIII. Giles, 5 Dow. 255.) He must also, at the time of service of the copies, be shown the originals in such a way that he can read the contents, though they need not be placed in his hands (Calvert v. Redfearn, 2 Dow. 505): and this whether a sight of them be demanded or not. (2 Lush's Pr. 1065.) Serving a copy of an award one day, and showing the original two days after. when the demand was made for performance, has been held insufficient. (Lloyd v. Harris, 8 C. B. 63.) Where the arbitrators have enlarged the original time given them for making their award, a notice of such fact, and that the award was made within the enlarged time, should also be given to the party who has to perform the award. (Dodington v. Bailward, 7 Scott, Service of the original submission is not necessary. (Greenwood v. Dyer, 5 Dow. 255.)

When personal service dispensed with.

No attachment will in general be granted without personal service, in any case where the party applying has another remedy, and this although the party purposely avoid the service. (Richmond v. Parkinson, 3 Dow. 703.) But where it appeared that the party had personal knowledge of the award, from a former service of the same award, the Court of Queen's Bench granted an attachment. (Re Bower, 1 B. & C. 264.) But personal service can only be dispensed with when it appears that the party is evading service. (Thomas v. Rawlings, 28 L. J., Ex. 347.) Service on his attorney is not sufficient. (Evans v. Prosser, 34 L. J., Q. B. 356.) The courts will not infer personal service to bring the party into contempt: thus, where it appeared that the service was made at the defendant's house, and the servant with the rule and award went up stairs, and returned with an answer that the defendant's attorney would be there on the following day, and would give an answer; it also appeared that the

defendant was confined to his bed with the gout: the CHAP. XVIII. court refused an attachment observing that they could not infer from these circumstances that the rule and award had come to the defendant's hands. (Brander v. Penleaze, 5 Taunt. 813.) If an award be against two, and one of them be personally served, but a personal service on the other be found impracticable, the court will grant an attachment against the one served. (Richmond v. Parkinson, 3 Dow. 703.)

To sustain an attachment, the person in whose favour Oral demand the award is made should, at or after the time of serving of performance necessary. the copies of the award and other documents as above mentioned, make an express oral demand of performance of the award. (Lloyd v. Harris, 7 D. & L. 118; Swinfen v. Swinfen, 18 C. B. 485.) The fact that a particular time and place are fixed by the award for the performance, does not dispense with the necessity of a personal demand for the purpose of attachment. (Brandon v. Brandon, 1 B. & P. 394.) But it is not necessary the demand should be at the time fixed for performance. (In re Craike, 7 Dow. 603.) On the other hand it cannot be made until the time has fully expired. And where a deed to be prepared by the one party, is to be executed by the other on a certain day, it must be tendered on that day. (Doe d. Williams v. Howell, 5 Ex. 299.) A demand made by one of several plaintiffs of money payable under an award is sufficient. (Drew v. Woolcock, 24 L. J., Q. B. 22; Baily v. Curling, 20 L. J., Q. B. 235.) But where an award ordered a bond to be delivered to three plaintiffs, a demand by the three, or under power of attorney from all, was held necessary. (Sykes v. Haigh, 4 Dow. 114.) It has been held that a personal demand of money payable under an award, with a view to a proceeding on a

CHAP. XVIII. rule of court, may be dispensed with where the party is evidently keeping out of the way to avoid the demand. (Smith v. Troup, 7 C. B. 757.)

Demand by agent or attorney.

When it is impossible or inconvenient for the party to make the demand personally he may depute his agent, duly authorized by a power of attorney, to do so. (Laugher v. Laugher, 1 Dow. 284; Ex parte Fortescue, 2 Dow. 448.) Where costs are awarded, a demand by the attorney of the party is by virtue of his character sufficient, without a power of attorney. (Inman v. Hill, 4 M. & W. 7; Mason v. Whitehouse, 4 Bing. N. C. 692.) So an attorney may demand a sum expressly awarded to be paid to the plaintiff or his attorney. (Hare v. Fleay, 20 L. J., C. P. 249.) A power of attorney is not necessary to enable an agent to demand the execution of a deed directed by an award. (Kenyon v. Grayson, 2 Smith, 61; Tebbutt v. Ambler, 2 Dow. N. S. 677.)

Demand must be of the precise matter awarded, or of so much as is well awarded.

The precise thing or sum awarded must be demanded, otherwise there can be no attachment for refusal. (Strutt v. Rogers, 7 Taunt. 214.) If part of the award is void the demand should be confined accord-Thus, where two sums are directed to be paid, one of which the arbitrator has no power to award; if both sums are demanded an attachment will not be granted for either, but if the demand be for the sum only which is well awarded, the court will grant an attachment for that sum. (Poyner v. Hatton, 7 M. & W. 211; Whitehead v. Firth, 12 East, 165; Tattersall v. Parkinson, 2 Ex. 342.) Where an award, upon a submission of all matters in difference between partners, directed the delivery up of a particular box, which was a matter not specifically referred to the arbitrator, and which had been parted with before the date of the submission, it was held that an attachment could not be CHAP. XVIII. granted for non-performance of that part of the award. (Smith v. Reeves, 2 H. & W. 306.)

Where an award directed that the plaintiff should, on a given day, deliver up to the defendant a warrant for a hogshead of port wine lying in the London Docks, describing it by its number and marks; and the demand required the plaintiff to deliver up one hogshead of port wine, describing it, it was held that this was not a sufficient demand to support an attachment. worth v. Brian, 1 C. B. 131.)

The motion for attachment must be supported by affi- Affidavits on It should be entitled in the cause where there is an attachment. one in court. If there is no cause depending, it need not be entitled, or may be entitled "In the matter of an arbitration between A. B. and C. D." The affidavit must verify the award, and show that it was made in time (Wohlenberg v. Lageman, 6 Taunt. 251; Higgins v. Street, 25 L. J., Ex. 285); and the original award is usually annexed. When the time has been enlarged, the affidavit must show that it was regularly enlarged, and that the defendant had notice of the enlargements, and that the award was made within the enlarged time. (Davis v. Vass, 15 East, 97.) But where time was enlarged by an arbitrator, under a power given to him in the order of reference, and the order and enlargement were made a rule of court, it was held not to be necessary in moving for an attachment to verify the affidavit that the time was duly enlarged. (Dickins v. Jarvis, 5 B. & C. 528.) It is as well to state in the affidavit that the submission has been made a rule of court, and to annex such rule to the affidavit, or make it an ex-There must also be an affidavit showing that all

the steps necessary to bring the party into contempt,—

the motion for

CHAP. XVIII. such as personal service of the necessary documents, and a proper demand and refusal, or neglect to perform the award,—have been taken. When the demand has been made by an agent, under a power of attorney. there must be an affidavit of the due execution of the power of attorney. (Laugher v. Laugher, 1 Dow. 284.) It must also appear by affidavit that the party applying has performed, or offered to perform, all conditions precedent directed by the award. (Standley v. Hemmington, 6 Taunt. 561.) The affidavit should also show that the award remains unperformed, and the money (if awarded) unpaid. (See Gifford v. Gifford, Forrest, 80.)

Lost award.

When the original award is lost, an affidavit verifying a true copy of the award, and that the original is lost, is sufficient to induce the court to grant an attachment. (Robinson v. Davis, 1 Str. 526; Hill v. Townsend, 3 Taunt. 45.)

An attachment for the non-performance of an award, cannot be moved for on the last day of term (Anon., 1 Burr. 651); nor can cause be shown against that rule on the last day of term.

The rule for an attachment is nisi only.

The rule obtained is a rule to show cause. ---, 2 Chit. 57; Chanler v. Driver, 12 Mod. 317; Daniell v. Beadle, 2 Scott, N. R. 155.) It is drawn up on reading the rule making the submission a rule of court, and the affidavits stating the facts necessary to bring the party into contempt. (Sherry v. Oke, 3 Dow. 349; Browne v. Collyer, 20 L. J., Q. B. 426.)

Must be personally served.

The rule nisi must be personally served (Garland v. Goulden, 2 Y. & J. 89); but if the party appears he waives any objection as to the service, and cannot object that the service of the rule was not personal. (Levi v. Duncombe, 1 C. M. & R. 737; Cartwright v. Blackworth, 1 Dow. 489.) It cannot be served on Sunday.

(Mc Reham v. Smith, 8 T. R. 86.) It seems that the CHAP. XVIII. court will not open the rule for an attachment on an affidavit of the party in contempt that he has not been served. (Hopley v. Granger, 1 B. & P., N. R. 256.)

Against the rule the other party may show as cause, What may be any defect apparent upon the face of the award, even cause against although the time limited for setting it aside may have the rule. elapsed. (Pedley v. Goddard, 7 T. R. 73; Randall v. Randall, 7 East, 81.) But matters extrinsic, which should have been made the subject of a motion to set aside the award, cannot be shown as cause (Brazier v. Bryant, 3 Bing. 167; Holland v. Brooks, 6 T. R. 161; McArthur v. Campbell, 4 N. & M. 208); unless they show that no award has been made, or that two arbitrators have not executed it at the same time. (Wright v. Graham, 3 Exch. 131.) It has even been held that the pleadings in a cause referred cannot be looked to, though brought before the court by an affidavit identifying them, so as to show the award defective on its face. (Davies v. Pratt, 25 L. J., C. P. 71.) Any irregularity in the demand, or service of the award or other necessary documents, may be shown as cause against the rule; so may defects in the affidavits on which the rule has been obtained.

A cross demand, being a matter within the submission but not brought before the arbitrator, cannot be used as an answer to the rule. (Smith v. Johnson, 15 East, 213.)

Cross motions for an attachment, and for setting aside the award, are often heard together.

If the affidavits used in moving for the rule nisi are Second applidefective, a second application on amended affidavits is seldom allowed (Re Butler, 13 Q. B. 341); and though the court on objections purely technical will discharge

CHAP. XVIII. the rule without costs, the party showing cause may, after taking the objection, be allowed, without waiving his advantage, to enter into the merits, so as to ask that the rule be discharged with costs. (In re Chamberlain, 8 Dow. 686.)

Rule made absolute.

If no cause be shown, the rule, on an affidavit of personal service of the rule nisi, will be made absolute. This affidavit is entitled like the rule nisi. (In re Houghton, 2 M. & P. 452.)

When the rule is made absolute, it must be drawn up, and the attachment will issue.

SECT. 2.—By Execution under 1 & 2 Vict. c. 110.

Where a submission to arbitration is by, or has been made, a rule of court, the payment of money or costs awarded, or of costs payable under the submission, may be enforced by a writ of execution, as on a judgment. 1 & 2 Vict. c. 110, s. 18, enacts "That all decrees and orders of courts of equity, and all the rules of courts of common law, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such monies, or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law, with respect to matters depending in the same courts, shall and may be exercised by the courts of equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review

1 & 2 Vict. c. 110, s. 18, gives a rule the effect of a judgment.

in matters of bankruptcy, and by the Lord Chancellor in CHAP. XVIII. matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any monies, or costs, charges, or expenses, are by such orders or rules respectively directed to be paid."

Before applying for a rule under this statute the sub- Mode of pro-Execution, the statute. mission must be made a rule of court. however, cannot issue on that rule; a rule must be obtained calling on the delinquent party to show cause why the money, directed to be paid by the award, should not be paid in pursuance of it. If such rule be made absolute, execution may then issue for the sum specified in the rule. (Jones v. Williams, 11 A. & E. 175; Doe v. Amey, 8 M. & W. 565; 1 Dow., N. S. 23.) Or the award may be enforced under the act, by obtaining a judge's order for the payment of the sum awarded, and then making such order a rule of court, and issuing execution on that rule. (2 Chit. Arch. 1700, 12th ed.)

A rule or order for payment of money in pursuance When rule of an award, will, in general, only be granted when an granted. attachment would be granted for its non-payment. (Creswick v. Harrison, 1 L. M. & P. 721; In re Laing, 13 C. B. 276.) If there be any doubt as to the validity of the award it will not be granted. (Dickenson v. Allsop, 13 M. & W. 722; Mackenzie v. Sligo and Shannon Rail. Co., 19 L. J., C. P. 142.) Nor will it be granted if the party applying be, at the same time, endeavouring to obtain the benefit of the award by any other legal proceedings. If a person ordered to pay money under an award, satisfies the court that he has a bond fide claim for a cross demand larger than the sum awarded, which he might reasonably hope to support by way of set-off to an action on the award, the

CHAP. XVIII. court will not grant a rule ordering him to pay the sum awarded. (Swayne v. White, 31 L. J., Q. B. 260.) And where by an award the plaintiff was to pay the costs of a chancery suit between himself and the defendant, which costs had not yet been ascertained, a rule was refused to compel the defendant to pay other sums due under the award. (Lambe v. Jones, 9 C. B., N. S. 478.) The attorney of the successful party, claiming a lien on the sum awarded, cannot have a rule in his own name, but only in that of his client, unless there be a collusion between the parties to defraud him of his lien. (Dunn v. West, 10 C. B. 420; Brearey v. Kemp, 24 L. J., Q. B. 310.)

Award containing no direction to pay.

Service and demand necessary as for an attachment.

A rule will be granted though there be no direction in the award to pay; the practice in this respect differing from that of attachments. (Baker v. Cotterill, 7 D. & L. 20; Bowen v. Bowen, 31 L. J., Q. B. 193.)

Generally in an application for the rule to pay the money awarded, the same formalities as to personal service of documents and demand of performance are to be observed as, when an attachment is moved for, though in some cases a less strict mode of proceeding will be allowed. (Hawkins v. Benton, 2 D. & L. 465; Wilson v. Foster, 6 M. & G. 149; Lloyd v. Harris, 18 L. J., C. P. 346; Tattersall v. Parkinson, 17 L. J., Ex. 208.)

The application for the rule may be made before the time for setting aside the award has elapsed, for if there is any objection to the award it may be shown as cause against the rule. (Hare v. Fleay, 11 C. B. 472; O'Toole v. Pott, 26 L. J., Q. B. 88.)

The rule nisi only.

The rule is nisi only in the first instance (Winwood v. Hoult, 14 M. & W. 197): and at the time it is drawn up the award must be deposited with the master.

(Davis v. Potter, 21 L. J., Q. B. 134.) It may Chap. XVIII. (differing from the case of an attachment), be moved Moved for on for on the last day of term (Leblé v. Carrell, 24 L. J., last day of term. Q. B. 96); and may be made returnable at chambers. (Drew v. Woolcock, ib. 22.) It is not necessary to make it part of the rule that the party obtaining it foregoes the remedy by attachment, nor is it necessary to call upon the defendant to show cause why execution should not issue, but merely to show cause why he should not pay the money. (Burton v. Mendizabel, 1 Dow., N. S. 336.) The rule is a six-days' rule, and the court will not without a special reason order it to be drawn up for a shorter time. (Arthur v. Marshall, 2 D. & L. 376.)

The rule nisi must, in general, be personally served Service of (Jordan v. Berwick, 1 Dow., N. S. 271), but under special circumstance, where this cannot be accomplished, such service will be permitted as seems proper. (Doe d. Steer v. Bradley, 1 Dow., N. S. 259; Styring v. Lloyd, 12 W. R. 384.)

Cause cannot be shown on the last day of term. Showing cause. (Kerr v. Jeston, 1 Dow., N. S. 340.) On showing cause the same objections may be urged as in showing cause to a rule for an attachment. (Ib.; Harrison v. Creswick, 10 C. B. 441.) The parties cannot go into any matters de hors the award. (Davies v. Pratt, 17 C. B. 183.) The court will only look to what appears on the face of the award itself, and will not depart from this rule although the party in whose favour the award has been made has, subsequently to the award, been committed to take his trial for perjury during the proceedings. (Woollen v. Bradford, 33 L. J., Q. B. 129.) In such a case application should be made to set aside the award.

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The rule being made absolute execution may issue.

Rule to deliver land under C. L. P. Act, 1854.

By the C. L. P. Act, 1854, s. 16, "When any award made on any such submission, document, or order of reference as aforesaid, directs that possession of any lands or tenements capable of being the subject of an action of ejectment, shall be delivered to any party, either forthwith or at any future time, or that any such party is entitled to the possession of any such lands or tenements, it shall be lawful for the court of which the document authorising the reference, is or is made, a rule or order, to order any party to the reference who shall be in possession of any such lands or tenements, or any person in possession of the same claiming under or put in possession by him since the making of the document authorising the reference, to deliver possession of the same to the party entitled thereto, pursuant to the award; and such rule or order to deliver possession shall have the effect of a judgment in ejectment against every such party or person named in it, and execution may issue, and possession shall be delivered by the sheriff as on a judgment in ejectment."

Sect. 3.—By Judgment and Execution in pursuance of a Verdict.

Award in a cause considered as a verdict.

Where a cause is referred at nisi prius, and a verdict taken subject to the award or certificate of an arbitrator, the sum awarded by the arbitrator is considered as the verdict of the jury, and the successful party may enter up judgment upon the verdict and sue out execution, without the leave of the court being obtained. (R. v. Gore, 8 Dow. 101; Maggs v. Yorston, 6 Dow. 481.)

If no verdict is taken on the reference, nor power CHAP. XVIII. given to the arbitrator to order a verdict to be entered When pay-(Hutchinson v. Blackwell, 8 Bing. 331), or he has be enforced omitted to exercise such power (Grundy v. Wilson, by judgment. 7 Taunt. 700), judgment cannot be signed for the amount awarded. Nor will the court grant a rule to amend the entry of the verdict taken at the trial subject to a reference, by entering it on such of the alleged breaches of contract as were proved according to the arbitrator's notes: indeed, the courts have no power to compel the arbitrator to produce his notes. (Scougull v. Campbell, 1 Chit. 283.)

If other matters besides those in difference in the Sum in respect cause are referred, the award as to such matters can of the cause only be enforced by action, attachment, or execution in the judgment, under 1 & 2 Vict. c. 110, and not under the judgment on the action. (Deere v. Kirkhouse, 20 L. J., Q. B. 195.)

In signing judgment the postea must be entered in the usual way in accordance with the award or certificate (Lee v. Lingard, 1 East, 400; Grimes v. Naish, 1 B. & P. 480; Bonner v. Charlton, 5 East, 139): but no entry is made of the award or certificate on the record. (2 Chit. Arch. 1702, 12th ed.)

There is no necessity, in order to enter up judgment No personal and proceed to execution, that there should be a per- service and demand necessonal service of the award or certificate upon the party sary before execution. liable, as in the case of attachment; it is sufficient if it is served in the ordinary way upon his attorney. (Borrowdale v. Hitchener, 3 B. & P. 244.)

If it be necessary to apply to the court to allow a When subverdict to be entered, they will not entertain the motion mission made a rule of until the order of reference is made a rule of court. court. (Kirkus v. Hodgson, 3 Moore, 64.)

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signed.

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When judgment may be

Where a verdict is taken subject to a reference, the party in whose favour the award or certificate is given, is entitled to sign judgment in fourteen days from the date of the award or certificate. (O'Toole v. Pott, 26 L. J., Q. B. 88; 7 E. & B. 102; Cromer v. Churt, 15 M. & W. 310.)

Where the order of reference contains a clause providing against the death of either party defeating the reference, and either of them dies after the verdict and before the making of the award, judgment may be entered under 17 Car. 2, c. 8, within two terms after the making of the award, and if the award be made in term, judgment may be signed before the end of the second term next after the making of the award. (Heathcote v. Wing, 25 L. J., Ex. 23; Tyler v. Jones, 3 B. & C. 144.) But it would be otherwise if the order contained no provision against the death of either party defeating the reference. (Rhodes v. Haigh, 3 D. & R. 608.) Where a cause is referred at nisi prius, and the award is not made for several terms afterwards, the verdict cannot be entered without a special application to the court for that purpose. (Brooke v. Fearns, 2 Dow. 144.) Where an award is lost the court will allow judgment to be signed upon an affidavit stating its contents. (Hill v. Townsend, 3 Taunt. 45.)

If an order of reference contain a clause restraining the parties from taking proceedings in error, they cannot move in arrest of judgment (*Chownes v. Brown*, 2 D. & L. 706); or for judgment non obstante veredicto. (Steeple v. Bonsall, 4 A. & E. 950.) And where the order of reference contained a clause restraining either party from bringing or prosecuting any action or suit in

any court concerning the premises referred, it was held, CHAP. XVIII. that the finding of the arbitrator was conclusive, and that the plaintiff could not move for judgment non ob-

stante veredicto. (Britt v. Pashley, 1 Ex. 64.)

A certain day being fixed in the award for the payment of money, although judgment may be entered; yet, if execution be taken out before that day the court will set it aside for irregularity. (Callard v. Paterson, 4 Taunt. 319.) Execution can only issue for the sum awarded, and not for interest accrued thereon. (Lee v. Lingard, 1 East, 400.)

By the C. L. P. Act, 1854, s. 10, "Any award Signing judgmade on a compulsory reference under this act, may, by compulsory the authority of a judge, on such terms as to him may reference. seem reasonable, be enforced at any time after seven days from the time of publication, notwithstanding that the time for moving to set it aside has not elapsed." On such a reference judgment must first be signed before execution. (Kendil v. Merrett, 25 L. J., C. P. 251, and see sect. 3.)

# SECT. 4.—By Action,

The performance of an award may be enforced by In what cases action, whether the submission be by deed, by writing an action will lie. not under seal, or by parol, by judge's order, order of nisi prius, rule of court, or order of equity. When the submission cannot be made a rule of court an action is the only remedy at law for enforcing the award. action may be maintained against the party liable to perform the award, at the same time that he is imprisoned for non-performance. (R. v. Hemsworth, 3 C. B. 745.)

Debt on the award.

An action for debt on the award lies to recover a sum awarded in all cases, whether the submission be by rule of court, or by deed, or other agreement in writing, or by parol. (2 Saund. 626; Perry v. Nicholson, 1 Burr. 278.) Before 3 & 4 Will. 4, c. 42, debt would not lie against an executor or administrator, on an award upon a submission entered into by his testator or intestate. That statute (sect. 14), however, enacts that an action of debt on simple contract shall be maintainable against an executor or administrator.

Debt on the arbitration bond.

Where the submission is by bond, an action of debt on the bond may be maintained for non-performance of the award, whether it be to pay money or perform some collateral act; and it is the preferable remedy. (Ferrer v. Oven, 7 B. & C. 427.) Where parties, who had submitted disputes to arbitration by mutual bonds, by indorsement under seal on the bonds of submission, made within the time limited for making the award, agreed that the time should be enlarged to a future day, it was decided that an action of debt on the bond would lie for non-performance of an award made after the original time had expired, but within such enlarged time; for such indorsement operated as a defeasance, or further defeasance to the original bond. (Greig v. Talbot, 3 D. & R. 446.) But if the indorsement had not been under seal, it is quite clear that an action could not have been maintained upon the bond for nonperformance of the award, for a defeasance to a bond can only be created or varied by deed. (Brown v. Goodman, 3 T. R. 592, n.) The remedy in the latter case would be in debt on the award, or assumpsit on agreement of submission.

Covenant on the submission.

Where the submission is by deed, an action of covenant will lie for non-performance of the award. (Marsh

v. Bulteel, 1 D. & R. 106; Charnley v. Winstanley, CHAP. XVIII. 5 East, 266.)

In all cases where the submission is by an instrument Assumpsit. not under seal, or by parol, an action of assumpsit will lie for non-performance of an award, whether the award is to pay money or do some other act. (Purslow v. Baily, 2 Ld. Raym. 1040.)

In an action on an award, if the award be bad, and Defence to so appear on the face of the declaration, the defendant may demur (Fisher v. Pimbley, 11 East, 188; Sim v. Edmonds, 23 L. J., C. P. 229); or if the award be defective for reasons not appearing on the face of the declaration, or even on the award, such as that the arbitrator has exceeded his authority, has not awarded on all matters submitted to him, or that it is not final, is uncertain, or the like, the defendant may take advantage of such matter by plea. (Mitchell v. Staveley, 16 East, 58; Cargey v. Aitcheson, 3 D. & R. 433; Perry v. Mitchell, 12 M. & W. 792; Beckett v. Midland Rail. Co., 37 L. J., C. P. 11.) But the corruption or other misconduct of the arbitrator in making his award, not appearing on the face of the award, cannot be pleaded: the party's only remedy in such a case is by bill in equity, or by motion to set aside the award. (Whitmore v. Smith, 31 L. J., Ex. 107; 7 H. & N. 509; In re Hall and Hinds, 2 M. & G. 847.)

Where money is awarded to be paid at a particular Interest. time and place, if duly demanded there on the day, interest from that day, together with the principal, may be recovered in an action on the award. (Pinhorn v. Tuckington, 3 Camp. 468.) So, where no particular time is mentioned, interest runs from the time of demand. (Johnson v. Durant, 4 C. & P. 327.) Interest can, however, only be recovered by action, and not on

CHAP. XVIII. a motion for attachment (ante, p. 217), or on an execution under 1 & 2 Vict. c. 110 (Doe d. Moody v. Squire, 2 Dow., N. S. 327), or on an execution issued on a judgment entered up pursuant to the award. (Lee v. Lingard, 1 East, 400.)

Costs, to be taxed before action for.

When the award gives the costs of the reference, but does not fix the amount, they need not be taxed before an action is commenced to recover them, but they ought to be taxed before trial. (Holdsworth v. Wilson, 32 L. J., Q. B. 289; 3 B. & S. 1.) When the costs of the award paid to the arbitrator are alone sought to be recovered from the defendant, and there is no suggestion that they are excessive, they need not be taxed. ( Threlfall v. Fanshawe, 19 L. J., Q. B. 334.)

Sect. 5.—By Bill for Specific Performance.

When a bill will lie.

The courts of equity will decree specific performance of an award, in all cases where the thing ordered to be performed is such as would be enforced, if the same were by agreement amongst the parties. Thus, a bill will lie for specific performance, where anything is awarded to be done in specie, as the conveyance of land or the like (Hall v. Hardy, 3 P. Wms. 190; Wood v. Griffith, 1 Swanst. 54), unless there be uncertainty in the award. (Hopcraft v. Hickman, 2 S. & S. 130.) But a bill will not lie to compel the execution of an award for the payment of money; the proper remedy, in such case, is either by action, or attachment on the award. (3 P. Wms. 190, n.)

Part performance.

There are cases in which the court has specifically enforced an award not binding in form of law ( Norton v. Mascall, 2 Vern. 24); but to warrant interference in such a case there must have been assent or part per-

formance, and in Blundell v. Brettargh (17 Ves. 232), CHAP. XVIII. Lord Eldon said, he had met with no authority for the specific performance of an award by arbitrators, appointed for the valuation of interests, where their acts, for the purpose of carrying into effect the agreement for an award, were not valid in law, as to time, manner, or other circumstances, unless, in the cases of acquiescence or part performance; and accordingly, in the case before him, refused specific performance of an agreement to sell at a valuation, which, on the construction of the agreement, the court held was to be made during the lives of the parties, one of them having died before the award was made.

The interference of the Court of Chancery to compel Performance specific performance, is, in exercise of its ordinary juris- of an award enforced as of diction as applied to agreements, and not of any juris- a contract. diction peculiar to awards; it follows that many, if not all the principles applicable to ordinary suits of that nature, must apply. (Fry on Specific Performance. 415.) Where, therefore, the agreement contained in the submission is such in its character as, whether from its unreasonableness, unfairness, or imprudence the court would not specifically enforce, this will prevent its interference in respect of the award founded on it. the court interfere where the award is excessive or defective; -not if it be excessive-for so far as the arbitrator has gone beyond his authority, there is no binding agreement between the parties; not if it be defective -because the parties had agreed to be bound by his decision on the whole, and not on part of the matters submitted to him. (Nickels v. Hancock, 7 De G., M. & G. 300.) And although an award of part of the matters referred may be good, equity will not enforce it unless

CHAP. XVIII. of all matters referred. (Hide v. Pettit, 1 Ch. Ca. 185.)

Unreasonableness.

The court will not generally take into consideration the reasonableness of an award in reply to an application for specific performance; for the arbitrators being judges of the parties' own choosing, it has been held that the award cannot be objected to by either of the parties on the ground of its unreasonable-(Ives v. Medcalfe, 1 Atk. 64.) Thus, in Wood v. Griffith (1 Swanst. 43), the court enforced specific performance of an award, which ordered the sale of an estate under circumstances which greatly depreciated its value. But the rule that the court will not consider the reasonableness of an award cannot be laid down as an universal one. (Parken v. Whitby, T. & R. 366; Nickels v. Hancock, 7 De G., M. & G. 300.) The court will not grant specific performance unless it can give full relief to both parties. (Blackett v. Bates, L. R., 1 Ch. Ap. 117.)

The court could not enforce specific performance of a contract, part of which is left to be decided by arbitration, and has not been so decided. (*Tillett* v. *Charing Cross Bridge Co.*, 26 Beav. 419.)

Although the submission contains an agreement that it shall be made a rule of a court of common law, so that the Court of Chancery would have no jurisdiction to set aside the award; yet a bill for specific performance may be filed. (Hawksworth v. Brammall, 5 M. & C. 281; Auriol v. Smith, 1 T. & R. 121.)

Effect of other proceedings.

It seems that even if an award be one of which specific performance might be enforced, a party could not, after having taken ineffectual proceedings to set it aside, enforce specific performance. (Blackett v. Bates, L.

R., 1 Ch. App. 117.) But it is no ground to prevent CHAP. XVIII. a decree for specific performance that the Court of King's Bench had granted an attachment against the defendant for non-performance of the award, in refusing to execute an authority to sell an estate, and had discharged the attachment on receiving their officer's report that the defendant had not been guilty of a contempt. (Wood v. Griffith, 1 Swanst. 43.)

The specific performance of an award which directs Illegality and the doing of illegal acts will not be enforced. (Walters v. Morgan, 2 Cox, 369.) Nor will the court grant specific performance when a long time has elapsed without any attempt to enforce the award. (Eads v. Williams, 24 L. J., Chanc. 531.)



## APPENDIX.

### PART I.

#### PRECEDENTS.

### No. I.

Clause in an Instrument providing for the Reference of future Disputes.

Provided always, and it is hereby agreed and declared, that if any doubt, dispute, question, difference, or controversy shall arise between the said parties to these presents, or their respective heirs or assigns [or "executors or administrators," or such other representatives of the respective contracting parties as the other portions of the instrument are intended to bind], touching these presents or any clause or thing herein contained, or the construction hereof, or any matter in any way connected with these presents or the operation thereof, or the rights, duties, or liabilities of either party in connection with the premises, then and in every or any such case the matter in question or difference shall be referred to two arbitrators, or their umpire, pursuant to, and so with regard to the mode and consequence of the reference, and in all other respects to conform to the provisions in that behalf contained in "The Common Law Procedure Act, 1854," or any then subsisting statutory modification thereof; and upon every or any such reference the arbitrators and umpire shall respectively have power to examine the parties and witnesses upon oath or affirmation, and to take the opinion of such counsel as they or he may think fit upon any question of law that may arise, and at their or his discretion to adopt any opinion so taken, and to obtain the assistance of such accountant, surveyor, or

valuer, as they or he may think fit, and to act upon any statement of accounts, survey, or valuation thus obtained, and either to fix, settle, and determine the amount of the costs of the reference and award respectively, or incidental thereto, to be paid by both parties or by either party, or to direct the same to be taxed either as between solicitor and client, or as between party and party, or otherwise, and to direct and award when, and by, and to whom such costs shall be paid: And that all deeds, papers, writings, and evidence that shall be in the possession or under the control of the said parties, shall be produced to and deposited with the arbitrators or the umpire, at their or his request: And that the submission to reference hereby made may at any time be made a rule of any court of law or equity on the application of any party interested, and that the court may remit any matter to the arbitrators or the umpire with any directions the court may think fit.

#### No. II.

Appointment of an Arbitrator under a Clause referring future Differences.

To X. Y., Esquire.

### No. III.

Notice of the Appointment to the other Party. Sir,

I hereby give you notice that I have this day appointed X. Y. of &c., to be the arbitrator on my behalf, to settle by arbitration in pursuance of the proviso in that behalf contained in an indenture dated, &c., the disputes and differences that are now depending between us. And I hereby give you further notice within seven days from the service of this notice on you, to name an arbitrator to act on your behalf in the matter of the said disputes and differences, or failing to do so the said disputes and differences will stand referred to the said X. Y. alone.

C. D.

To A. B.

### No. IV.

Submission of all existing Differences to a single Arbitrator—Short Form.

- 2. This submission may be made a rule of any of the superior courts, and shall not be determined by the death of either of us.

| Witness | our | hands | this | <br>day | of ——. |    |    |
|---------|-----|-------|------|---------|--------|----|----|
|         |     |       |      | -       |        | A. | В. |
|         |     |       |      |         |        | C. | D. |

### No. V.

Submission of Specific Differences to a Single Arbitrator—Short Form.

- 3. The said arbitrator shall have power to order and determine what he shall think fit to be done by either of the parties hereto respecting the matters in difference.
- 4. The said arbitrator shall have power either to finally settle and determine the amount of the costs, charges, and expenses (if any) awarded by him, or to direct such costs to be taxed as between solicitor and client or otherwise, or to direct such costs and expenses to be ascertained and settled by any other person or persons, and to direct and award when, and by, and to whom, and in what manner such costs, charges, and expenses respectively, shall be paid.
- 5. The respective parties hereto will produce all such evidence (documentary or otherwise) in their possession or under their control as the said arbitrator may require, and will do and cause to be done all other things necessary and

convenient for enabling the said arbitrator to make his award without delay, and will in all things abide by and perform the said award when made.

6. This submission may be made a rule of the court of ——————— by either party without the consent of the other party, and shall not be revoked by the death of either party before the making of the said award.

In witness, &c.

### No. VI.

Submission to two Arbitrators or their Umpire by Deed—Ampler Form.

- - 2.\* The said arbitrators, at any time before making their
- If the words in brackets in clause 1 are retained, clause 2 will be omitted.

award, may by writing, indorsed on these presents, appoint an umpire.

- 3. The said parties hereto, their executors and administrators, will in all respects abide by, observe, perform, and obey the said award so to be made and published as aforesaid.
- 4. All books, deeds, papers, writings, and evidence in the possession or under the control of the respective parties, relating to the matters referred, shall be produced to and deposited with the said arbitrators, or their umpire, at their or his request.
- 5. The said parties respectively will do all other acts necessary to enable the said arbitrators, or their umpire, to make their or his award herein, and neither of them will wilfully or wrongfully do, or cause to be done, any act to delay or prevent the said arbitrators, or their umpire, from making their or his award. And if either of the said parties shall wilfully or wrongfully do, or cause to be done, any such act as aforesaid, he shall pay to the other party such costs as the said arbitrators or their umpire may in writing declare to be reasonable.
- 6. The said arbitrators, or their umpire, shall have general authority to require from either of the said parties such written statements and explanations as may be required.
- 7. In case either party refuse or fail after reasonable notice to attend, either personally or by counsel or attorney, before the said arbitrators, or their umpire, at any meeting which they or he may appoint, it shall be lawful for them or him to proceed ex parte as effectually as if such party were present.
- 8. The said arbitrators, or their umpire, may in their or his said award order either party to do or to submit to any acts or to sign or execute any written instrument, and in the latter event may direct by whom and at whose expense the same is to be prepared, and may name any counsel by whom the same shall be settled in case the parties cannot agree thereon.
- 9. The costs of this reference and the award shall be in the discretion of the said arbitrators or their umpire, who may direct when and to and by whom and in what manner

the same or any part thereof shall be paid, and whether the same respectively ought to be paid as between solicitor and client or as between party and party.

- 10. Neither of the parties hereto will bring or prosecute any action or suit in any court of law or equity against the other or against the said arbitrators or their umpire or either of them, for or in respect of the said matters in difference or any or either of them, or the said award to be made in pursuance of this submission.
- 11. This submission may be made by either of the parties hereto, without the consent of the other party, a rule of the court of ———.
- 12. Should either of the said parties hereto dispute the validity of the said award or move the court of ——— [the court of which the submission is to be made a rule] or any other court to set the same or any part thereof aside, or in any other event, the said court of ——— or any judge of the superior courts at Westminster shall have power at any time and from time to time to remit the matters hereby referred, or any or either of them, to the re-consideration and redetermination of the said arbitrators or their umpire, and with, upon and subject to such directions, powers and terms as to the said court or judge may seem proper.

In witness, &c.

## No. VII.

Submission by Bond—Referring Disputes between a Landlord and Tenant.

Know all men by these presents, that I, A. B., of, &c., am held and firmly bound to C. D., of, &c., in the sum of £——— of lawful money of Great Britain, to be paid to the said C. D., or to his certain attorney, executors, administrators or assigns, for which payment well and truly to be made I bind myself, my heirs, executors and administrators, firmly by these presents. Sealed with my seal. Dated the ——— day of ————, 18

Whereas differences have arisen and are now depending

between the above-bounden A. B. and the above-named C. D. concerning the occupation, management and cultivation by the said C. D. of a certain farm called ---- situate at ----, the property of the said A. B., lately held by the said C. D. as tenant thereof, and also concerning the payment of the several sums of money paid, laid out and expended by the said A. B. for ploughing, harrowing and manuring the said farm previously to the said C. D. entering upon the same as tenant, and likewise concerning the rent payable in respect of the said farm from the said C. D., and all which differences and demands concerning the same the said parties have agreed to refer to the award and determination of G. L. of the Middle Temple, barrister-at-law: Now the condition of this obligation is such that if the above-bounden A. B., his heirs, executors and administrators and every of them do and shall on his or their part and behalf in all things well and truly stand to, observe, perform and keep the award and final determination of the said G. L., of and concerning the occupancy and management of the said farm, and the sum laid out by the said A. B. in the cultivation of the same, and the rent payable in respect of the same, and also touching all other matters in dispute between the said parties [in respect of the premises], so as the said award be made in writing under the hand of the said G. L., ready to be delivered to the said parties in difference, or if they or either of them shall be dead before the making of the award, to their respective personal representatives who shall require the same on or before the ----- day of ---- next, or within such extended time not exceeding after that day as the said G. L. shall by writing under his hand appoint, then the above-written obligation to be void, otherwise to remain in full force. And the said A. B. and C. D. do hereby consent and agree that this submission shall be made a rule of the court of ——— at the instance of either of the parties, their executors or administrators. And it is further agreed by and between the said A. B. and C. D. that, &c. [add any other clauses that may be necessary].

Signed, sealed and delivered in the

presence of ———.

[Note.—A bond similar in all respects will be executed by C. D. to A. B.]

### No. VIII.

## Reference by order of Nisi Prius on the usual Terms.\*

To wit. (the -

At the sitting of Nisi Prius, held at ———, on e ——— day of ———, in the year of our

Lord 18, before the Honourable Sir ----, one of the barons [or justices] of our lady the Queen, of her Court of Exchequer. It is ordered by the court, by and with the consent of the parties, their counsel and attorneys, that the jury D. I find a verdict for the plaintiff for £\_\_\_\_\_, the claim in the declaration, costs forty shillings, subject to the award [certificate], order, arbitrament, final end and determination of S. U. of, &c., who is hereby empowered to direct that a verdict shall be entered for the plaintiff or defendant, or a nonsuit entered, as he shall think proper and to whom this cause [and all matters in difference between the said parties] is [are] hereby referred, so as the said arbitrator shall make and publish his award [or certificate] in writing concerning the matters hereby referred, ready to be delivered to the said parties or either of them, or if they or either of them shall be dead before the making of the said award for certificate 1 to their respective personal representatives who shall require the same, on or before the ------ day of next ensuing, with liberty to the said arbitrator, by any writing under his hand, to be indorsed hereon, from time to

time to enlarge the time for making his said award [or cer-

have all the powers as to certifying, amending, and otherwise of a judge sitting at nisi prius. And it is also ordered

It is also ordered that the said arbitrator shall

that the costs of this cause shall abide the event of the said award [or certificate], and the costs of the reference and award [or certificate] shall be in the discretion of the said arbitrator, who may award or certify by and to whom and in what manner the same shall be paid. And it is also

<sup>•</sup> In references by order of nisi prius, judge's order, &c., printed forms are used, similar in effect to this precedent, which is therefore inserted chiefly as explanatory of the text (p. 30), as to what are "nsual terms."

ordered, by the like consent, that the said arbitrator shall have authority to hear, receive, and examine evidence touching the matters hereby referred, and that the said parties shall produce before the said arbitrator all such books. deeds, papers, and writings relating to the matters in difference between them, as the said arbitrator shall require. And it is also ordered that the said arbitrator may find generally for the plaintiff or for the defendant, and need not find upon any specific issues unless required to do so. costs of any such specific issues (if found) to abide the event. And it is also ordered, by the like consent, that the said parties shall, on their respective parts, in all things stand to, obey, abide by, perform, fulfil, and keep the award, order [certificate], arbitrament, final end and determination of the said arbitrator, so to be made and published as aforesaid. And that neither of the parties shall proceed in or allege error, or prosecute any action or suit, at law or in equity, against the said arbitrator or against each other respectively for any matter relating to the arbitration or the award for certificate] to be made in pursuance of this order. And that if either party shall by affected delay or otherwise wilfully prevent the said arbitrator making his award for certificate]. he or they shall pay to the other such costs as the said court shall think reasonable; and that if either of the said parties shall, after reasonable notice, and without such excuse as the said arbitrator shall adjudge to be reasonable. fail to attend any meeting, then the said arbitrator may proceed ex parte. And it is also ordered, by the like consent, that either of the said parties shall be at liberty to move the said court of ——, that this order may be made a rule of that court, and that in the event of any other application to the said court on the subject of this reference or the said award [or certificate] so to be made and published as aforesaid, the said court or a judge may at any time and from time to time refer back to the said arbitrator the whole or any part of the matter hereby referred upon such terms as the said court or judge shall think proper.

By the Court.
——, Associate.

### No. IX.

## Order of Reference of County Court.

By the consent of the plaintiff and defendant it is, at a court holden this day, ordered that all matters in difference in this cause [and all other matters within the jurisdiction of this court, in difference between the said parties] be referred to ——— of ———, whose certificate, to be made or given on or before the ———— day of ————, 18 , shall be entered as the judgment in this cause; and it is further ordered, that the time for making or giving such certificate may be from time to time enlarged by the judge of the court in his discretion, for such time as he shall, by indorsement to be by him made on this order, direct; and that the said certificate, when made or given, may be referred back again to the said arbitrator at the like discretion of the said judge without the further consent of the said parties; and in case either of the said parties shall neglect or refuse to attend any appointment to be made by the said arbitrator for proceeding under this order, after two days' notice thereof in writing shall have been given to him by serving the same personally or by leaving it at his last or usual place of abode, the said arbitrator shall be at liberty to proceed ex parte on the matters of the said reference, and his certificate shall be as valid as if both the said parties had duly attended before him; and it is further ordered, that the costs of the said reference shall be in the discretion of the arbitrator, and that the costs of the action shall abide the event; and it is lastly ordered, that the submission to arbitration shall not be revocable by either party.

Given under the seal of the court, this ---- day of

By the Court,
Registrar.

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### SPECIAL CLAUSES IN SUBMISSIONS.

### No. X.

In a Submission by an Executor or Administrator— Reference not to be an Admission of Assets.

The submission to reference hereby made shall not be deemed or taken to be an admission by the said A. B. that he has assets of the said [deceased]; but the said A. B. shall be at liberty to deny before the said arbitrator at any time before the case is closed that he has at the time of such denial assets in his hands lawfully liable to the demands of the said C. D.; and if the said A. B. shall make such denial as aforesaid, the said arbitrator, if requested by the said C. D., shall inquire whether or not the same be true. If the said arbitrator shall by his award find any sum of money to be due to the said C. D., he shall, if he shall find that the said A. B. had at the time to which the said inquiry referred, assets liable to the demands of the said C. D., direct the said A. B. to pay to the said C. D. the said sum awarded to be due, or so much thereof as the assets so found to be liable shall be sufficient to satisfy. And if the said arbitrator shall find that the said A. B. had no such assets or not sufficient to pay the whole amount so awarded to be due to the said C. D., he shall be at liberty to award that the said A. B. shall pay to the said C. D. the said amount (or so much thereof as the assets in hand do not avail to satisfy as aforesaid) out of any assets which may have come into the hands of the said A. B. since the time included in the said inquiry as aforesaid, or which may thereafter come into them. And if the said arbitrator shall find any sum of money to be due from the said C. D. he shall direct the latter to pay the same to the said A. B.

### No. XI.

Particulars of Claims, &c. to be furnished by each Party.

The same course shall be adopted concerning any set off or counter claim adduced by either of the parties against the demands of the other of them.

### No. XII.

### Evidence.

The witnesses in this reference shall be examined on oath.

The arbitrator may, in his absolute discretion, admit as evidence any affidavit or statutory declaration concerning the matters in difference (and whether the same may have been made in any other proceeding or in contemplation of this reference), a copy thereof having been given three days previously to the party against whom the same is offered; but the person whose evidence is so taken shall be subject at any time to cross-examination by such party, if he shall think fit to bring him or her before the said arbitrator.

## No. XIII.

### Costs.

The costs of the reference and award shall abide the event of the award.

The costs of the cause shall abide the event of the award as to the cause, and the costs of the reference and award shall be in the discretion of the arbitrator.

Each of the said parties shall bear and pay his own costs of and attending the reference, and the costs of the award shall be borne and paid by the said parties in equal proportions.

The arbitrator shall have the same power of certifying which a judge at nisi prius would have had on the trial of the said cause.

## No. XIV.

## Power to employ an Accountant.

The arbitrator shall be at liberty to employ an accountant to whose examination he may submit such accounts connected with the matters hereby referred as he shall think fit. And the said arbitrator may act upon any statement of accounts given by such accountant without being obliged to verify the same.

## No. XV.

# Power to have Maps, &c. made.

The arbitrator shall have power to cause such maps, plans and admeasurements to be made and taken as he shall deem necessary or expedient, and the costs and expenses thereof shall be in the discretion of the said arbitrator.

# No. XVI.

Power to fix Price of Land and employ a Surveyor, in a Submission between a Vendor and Purchaser.

The arbitrator shall have power to fix the price and terms upon which the said, &c. shall be sold by the said E. F. to the said G. H., and to and for that end or for any other purpose in relation to the premises he may, if he shall think fit so to do, require the aid and take the opinion of any surveyor or surveyors or other person or persons, and adopt such other measures and give all such directions as shall to the said arbitrator appear advisable or expedient.

## No. XVII.

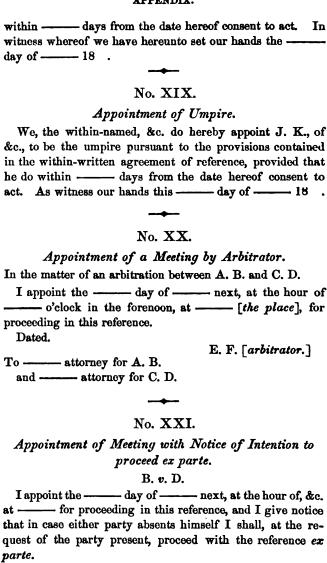
#### Power to make several Awards.

The arbitrator may from time to time make his award upon any question or questions in dispute between the said parties that may have arisen, and he shall not by so doing be deemed or taken to have determined his authority until all matters relating to the premises shall have been finally disposed of.

## No. XVIII.

Appointment of a third Arbitrator by the two others pursuant to the Submission.

We, the within-named E. F. and G. H., by this memorandum in writing under our hands made before entering upon the consideration of the matters within referred, do hereby nominate and appoint J. K., of &c., to be the third arbitrator to act with us according to the provisions of the within-contained indenture [or other instrument], provided that he do



E. F. [arbitrator.]

To A. B. and C. D. or their attornies.

Dated.

## No. XXII.

Enlargement of Time by Arbitrator under a Power in the Submission.

Dated the —— day of ——.

A. B.

## No. XXIII.

Enlargement of Time by the Parties.

[Note. This must be by an instrument of as high a nature as the submission.]

## No. XXIV.

Notice to the Parties of the Award made.

In the matter of a reference of matters in difference between A, B, and C, D.

\_\_\_\_ day of \_\_\_\_ 18 .

Gentlemen,

I hereby give you notice that I have this day made and published my award of and concerning the above matter, and that the same now lies at my chambers ready for delivery upon payment of my charges amounting to £———.

X. Y. [arbitrator.]

To A. B. and his attorney, and to C. D. and his attorney.

s 2

#### No. XXV.

Award by a single Arbitrator determining Cross Claims and ordering Payment of a Sum by one Party to the other.

To all to whom these presents shall come, I, G. L., of the Middle Temple, esquire, barrister-at-law, send greeting. Whereas by an agreement in writing, dated the ----- day of \_\_\_\_\_, and made between A. B., of, &c., of the one part; and C. D., of, &c., of the other part; the said parties agreed to refer all matters in difference between them [if necessary add "relative to," &c., stating the specific matters] to me the said G. L., so that I should make my award thereon, ready to be delivered to the said parties, on or before the - day of ---- next; and further agreed, that the costs of and attending such reference and of my award should be in my discretion. Now know re that I, the said G. L., having taken upon myself the burthen of the said reference, and having heard, examined, and considered the witnesses and evidence of both the said parties concerning the said matters so referred to me as aforesaid, do make and publish this my award, of and concerning the same, in manner following, that is to say, I AWARD and determine, of and concerning the said matters referred to me as aforesaid, that the said C. D. has a just and valid claim and demand against the said A. B. to the extent of £----, and that the said A. B. has a just and valid claim against the said C. D. to the extent of £——  $\lceil a \text{ less sum} \rceil$ , so that, after deducting the latter sum from the former, there remains justly due to the said C. D. from the said A. B. the sum of £——, AND I award, that the said A. B. do and shall, on the of ---- next, pay the said sum of £—— unto the said C. D., at his shop in ---- street, ----, between the hours of 11 and 12 of the clock in the forenoon, AND I award, that the said sum of £ \_\_\_\_ shall be paid, accepted and taken as and for full satisfaction and discharge, and as a final end and determination of the said differences in the matters so referred as aforesaid, and all demands upon or in respect of the same by either of the said parties against the other of them. AND I further award, that the said A. B. shall bear and pay his own costs of and attending the said arbitration, and shall pay to the said C. D. his costs of and attending the said arbitration, and shall pay the costs of this my award. And I determine the costs of the said C. D. to amount to £———.

Signed in the presence of ———

#### No. XXVI.

Award by three Arbitrators, on a Submission by several Persons, respecting Claims under three Wills.

TO ALL TO WHOM, &c., We [three arbitrators] send greeting. WHEREAS by an agreement in writing, bearing date the - day of \_\_\_\_, and made between J. H., of &c., of the first part; J. M., of &c., and Jane his wife (late Jane H. spinster), of the second part; the Reverend J. S., of &c., claiming in right of his late wife, C. S., formerly C. H. spinster, now deceased, of the third part; C. H., of &c., spinster, of the fourth part; and T. H., of &c., of the fifth part; the said parties agreed to refer all and all manner of claim and claims which they or any of them had, or pretended to have, by, from or under the several wills of T. T., long since deceased, G. H., deceased, and J. H., also deceased, respectively, to the award, order, arbitrament, and final determination of us the said [three arbitrators], so as, &c. Trecite time within which the award to be made, power to direct what shall be done, and power over costs, &c.]. Now know ye, that we the said [three arbitrators], having taken upon ourselves the burthen of the said arbitration, and having heard, and duly and maturely weighed and considered

the several allegations, vouchers, and proofs, brought before us, by and on behalf of the said parties in difference respectively, and having fully examined into their several alleged claims and interests, under the several and respective wills of the said T. T., G. H., and J. H., deceased, Do find, that the said T. T., by his said will, among other specific legacies, gave and bequeathed to his nephew J. T., who is yet living, the yearly interest of two hundred pounds, at the rate of four pounds ten shillings for one hundred pounds for a year, for and during the term of his natural life: and that after the decease of the said J. T., the said testator gave and bequeathed the said principal sum of two hundred pounds unto and amongst all and every the child and children of his said nephew J. T., who should be living at the time of the decease of the said testator, to be equally divided between them, share and share alike: and that the said T. T., by his said will, gave, devised and bequeathed all the rest and residue of his estate, both real and personal (subject nevertheless to the payment of his debts, legacies and funeral expenses, with which he charged as well his real as his personal estate), to the said G. H., deceased, his heirs, executors and administrators, whom he appointed sole executor of his said will. And we further find, that the estate of the said T. T., which came to the hands and possession of the said G. H., deceased, was fully sufficient to satisfy and discharge all the debts, legacies and funeral expenses of the said T. T., and the expenses attending the execution of his said will: and that a certain freehold house, with a close of land adjoining and thereto belonging, with the appurtenances, situate, lying and being at ----, in the said county of -, now in the possession or occupation of the said C. H., was part of the estate of the said T. T., and charged by him in and by his said will with the payment of his debts, legacies and funeral expenses, as aforesaid; and remains subject to, and chargeable with, the bequest hereinbefore mentioned to the said J. T., and his children; and further, that the said T. H., as surviving executor of the will of the said G. H., is entitled to the sum of one hundred pounds, secured by mortgage on a certain freehold house, with the appurtenances, situate - aforesaid, and known by the sign of the White

Lion, in the tenure or occupation of W. E.: AND we further find, that all claim, interest and demand which the said J. H., Jane M., or the said J. M. in her right, and the said J. S. in right of his said late wife, or either of them, ever had, in or upon the estate or effects or under or by virtue of the wills of the said T. T., G. H. and J. H., or of either of them, have been fully satisfied and discharged. AND we hereby award, order and adjudge, that the said C. H., her heirs, executors or administrators shall, within one calendar month from the day of the date hereof, deliver into the hands of the said T. H., or of his certain attorney, his executors or administrators, all deeds and other writings in her custody, possession or power, relating to, or in any way affecting the said freehold house, with the appurtenances, known by the sign of the White Lion: And shall also, within one calendar month from the day of the date hereof, convey by a good and sufficient conveyance and assurance in the law, and deliver possession of the said freehold house and close, with the appurtenances, situate at ——— aforesaid, and all deeds and other writings relating to or in any way affecting the same, or the title thereof, to the said T. H., or his certain attorney, or his heirs. And we further award, that the said C. H., shall retain for her own use and benefit all other the effects which came, or which may hereafter come, to her hands or possession as executrix of the last will and testament of J. H. (save and except any rents which she may have received since the decease of the said J. H. for or on account of the said estate at — aforesaid) in full satisfaction of all claim, interest and demand which she has or ever had in or upon the estate and effects or under or by virtue of the said several wills of the said T. T., G. H. and J. H., or of either of them. And we do hereby further award that the said T. H. shall, out of the said mortgage on the said house, with the appurtenances, at ----, called the White Lion, and out of the said freehold house and close at ----, pay, satisfy and discharge the bequest to the said J. T. and his children, according to the direction of the said will of the said T. T. And we further award and order that the said C. H. shall account for and pay to the said T. H., his executors or administrators, within one calendar month from the date hereof, all

rents which she may have received for or on account of either of the estates at ——— and ——— aforesaid, since the decease of her said brother J. H. And we do also award and order that the said T. H. shall pay and refund to the said C. H., her executors or administrators all sum and sums of money which she may have advanced or paid the said J. T., for and on account of the interest of the said sum of two hundred pounds mentioned in the will of the said T. T., since the decease of her said brother J. H. And we do likewise award, order and direct, that the said T. H. shall within one calendar month from the date hereof pay or cause to be paid to the said C. H. the sum of twelve pounds twelve shillings, for and in full discharge of all expenses which she has been at in the repairs of the said houses at -- aforesaid, or otherwise howsoever. And we do further award, that the said C. H. shall seal and execute to the said T. H. a release of all demands for or on account of any claim or interest in or upon the estate and effects, or under or by virtue of the wills of the said T. T., G. H. and J. H., or of either of them: and further, that the said C. H. do and shall within one calendar month from the date hereof deliver unto the said T. H., his executors or administrators, all books, accounts, discharges, releases and writings whatsoever respecting only the estates of the said T. T. and G. H., deceased, or either of them, and which are now in her custody, possession or power: and that when the said C. H. shall have fully complied with this our award in all things hereby ordered to be done by her, then the said T. H. shall seal and execute to her a similar release: and that the said J. H. and J. M. in right of his said wife, and the said J. S. in right of his said late wife, shall seal and execute similar releases to the said T. H. and C. H. AND we also award and order that the said T. H. do and shall execute to the said C. H. a bond in the penal sum of eight hundred pounds under a condition to indemnify her the said C. H. against all demands of the said J. T. and his children who were living at the time of the decease of the said T. T., or any person or persons claiming through them; and also against all and every other person or persons whomsoever claiming under the will and wills of the said T. T. and G. H., deceased, or either of them. And lastly, we do

hereby award and order, that the said T. H. shall pay or cause to be paid all charges and expenses attending the present arbitration.

In Witness, &c.

## No. XXVII.

Award by two Arbitrators of Compensation for Land taken under the Lands Clauses Consolidation Act.

To all to whom, &c., we, A. B., of &c., and C. D., of &c., send greeting. Whereas I, the said A. B., have been duly appointed an arbitrator on the part of R. P., of &c., and I, the said C. D., have been duly appointed an arbitrator on the part of the ----- Railway Company, (hereinafter referred to as "the Company,") for the purpose of settling by way of arbitration, in pursuance of the Lands Clauses Consolidation Act, 1845, the amount of compensation to be paid by the company for the purchase of all the estate and interest of the said R. P. in the lands and hereditaments specified in the schedule to a certain notice in writing under the hand of the secretary of the company, dated the ---- day of -, and described in a map or plan annexed to the said notice (of which schedule and map or plan, the schedule and map hereunder written and hereunto annexed are respectively copies), and also for the damage (if any) that may be sustained by the said R. P. by reason of the execution of the works of the company. And whereas the said R. P. by a notice in writing, dated the ---- day of ----, and given by him to the company, described his interest in the said lands and hereditaments as an estate of inheritance in fee simple, and claimed the sum of £ \_\_\_\_ for the purchase of his interest in the said lands and hereditaments, and the further sum of £ as compensation for injury which would be sustained by him by reason of the severing of the same lands from his other lands and otherwise injuriously affecting such other lands. AND WHEREAS the company offered to pay to the said R. P. the sum of £--- as and for the purchase of the said lands and hereditaments, and for compensation as aforesaid, and have not offered to pay any

larger or other sum whatever in respect of the same. Now KNOW YE, that we, the said A. B. and C. D., having taken upon ourselves the burthen of the said reference, and having, before entering into the consideration of any of the matters so referred to us as aforesaid, respectively duly made and subscribed, in the presence of a justice duly authorized in that behalf, the declaration required by the said Lands Clauses Consolidation Act, 1845 (which said declarations are hereunto annexed), and having viewed the lands and hereditaments hereinbefore mentioned or referred to, and having heard, examined and considered the allegations, witnesses and evidence of the respective parties, and duly weighed and considered all and singular the matters and things to us referred as aforesaid, Do make and publish this our award in writing of and concerning the said matters as follows, that is to say: We do award and determine that the sum of £ought to be paid by the company to the said R. P. for the purchase of the inheritance in fee simple of the said lands and hereditaments, and that the further sum of £ought to be paid by the company to the said R. P. for or in respect of the damage to be sustained by him by reason of the severing of the same from the other lands of the said R. P., or otherwise injuriously affecting such other lands by the exercise by the company of the powers of their act, or any act incorporated therewith. [If the sum awarded is greater than that offered by the company, add, And we further award and determine the costs of the said R. P. of and attending this arbitration to amount to the sum of £----, and the costs of this our award to amount to the sum of £-

In witness, &c.

## No. XXVIII.

Award on a Reference by Order of Nisi Prius made at the Sittings at Westminster.

TO ALL TO WHOM, &c., I, G. J. N., of &c., send greeting. WHEREAS by an order made at the sittings of nisi prius, held at Westminster Hall, in and for the county of Middle-

sex, on the ——— day of ———, before the Honourable Sir - Knight, one of the Barons of our Lady the Queen, of Her Court of Exchequer; in a certain cause, wherein A. B. was plaintiff and C. D. was defendant, it was ordered by the Court, with the consent of the parties, their counsel and attorneys, amongst other things, that a verdict should be entered for the plaintiff, with £500 damages and 40s. costs, subject to the award, order, arbitrament, final end and determination of me, G. J. N., Esquire, barrister-at-law, to whom the said cause, and all matters in difference between the said parties was thereby referred; and I was to order and determine what I should think fit to be done by the parties respecting the matters in dispute, so as I the said arbitrator should duly make and publish my award in writing, concerning the matters referred, ready to be delivered to the said parties or to either of them, or, if they or either of them should be dead before the making of the said award, to their respective personal representatives requiring the same, on or before the ----- day of ----- then next ensuing, or on or before any other day to which I the said arbitrator should, by any writing under my hand indorsed on the said order, from time to time enlarge the time for making my award; and it was also ordered that the costs of the cause should abide the event of the said award, and that the costs of the reference should be in the discretion of me the said arbitrator, who might award by and to whom and in what manner the same should be paid. [Recite such further portions of the order as will justify any subsequent directions other than those given below. And whereas I the said arbitrator did, by two several indorsements on the said order, enlarge the time for making my said award until the ——— day of – instant. Now I, the said G. J. N., having taken upon myself the burthen of the said reference, and having heard, examined and considered the allegations, witnesses, and evidence of both the said parties produced before me, do make and publish this my award of and concerning the matters by the said order so referred to me as aforesaid, in manner following, that is to say :- As to the issue firstly joined in the said cause, &c. [awarding specifically on all the issues]. AND I further award, that the plaintiff has sustained damages

by reason of the matters in the first and third counts of the declaration in the said cause mentioned to the extent of £........, which sum I order and direct the defendant to pay to the plaintiff. AND I further award and direct that the verdict so taken as agreed, do stand, but that the entry of damages be reduced to the said sum of £......................... over and above costs. AND I further award that there are no matters in difference between the said parties other than those in the said cause. AND lastly I award, that the defendant do bear and pay his own and the plaintiff's costs of and incidental to the reference, and do pay the costs of this my award.

In witness, &c.

# No. XXIX.

Commencement of an Award on a Reference by an Order of Nisi Prius made at the Assizes.

# No. XXX.

Commencement of an Award on a Submission by Judge's Order.

now last past, amongst other things, ordered by the Honourable Sir ———, knight, one of the judges of the said Court, by consent of the said parties, that, &c. [reciting the material parts of the order].

## No. XXXI.

Commencement of an Award on a Submission by Order of the Court of Chancery.

### No. XXXII.

Commencement of an Award on a Submission by mutual Bonds.

#### No. XXXIII.

Commencement of an Award under a Clause for referring future Differences in a Building Contract.

To ALL TO WHOM, &c. We, R. M. of, &c., and G. H. of, &c., send greeting. WHEREAS by articles of agreement, bearing

date, &c. and made between A. B. of, &c., gentleman, of the one part, and C. D. of, &c., builder, of the other part, he the said C. D., in consideration of the sum of £——— to be paid to him as hereinafter is mentioned, did covenant with the said A. B., that he the said C. D., would at his own expense, on or before the ——— day of ———, in a complete and workmanlike manner and with good and substantial materials of all sorts, make the several alterations, reparations and improvements to a messuage situate, &c. and in such manner as therein is more particularly mentioned and set forth; in consideration whereof the said A. B. did covenant with the said C. D., that he would pay unto the said C. D. the sum of £ in manner following, that is to say, the sum of  $\pounds$ —, part thereof, on the — day of — then next ensuing, and the sum of  $\pounds$ —, residue thereof, within fourteen days next after the said messuage should be completely repaired and improved in manner as therein is mentioned: and it was thereby mutually agreed, that if any dispute should arise between the said parties relating to the performance of the said articles, that then the same should be left to the decision of two indifferent persons as arbitrators, the one to be named by the said A. B., and the other by the said C. D., or to an umpire to be chosen by the said arbitrators. AND WHEREAS the said C. D. has completed the said alterations and improvements, and received the said first payment of the sum of £ \_\_\_\_. And whereas disputes have arisen touching the said alterations and improvements, and the same have been referred to us, the said R. M. and G. H. Now know ye, that we, the said R. M. and G. H., having taken upon ourselves the burthen of the said reference, and having viewed and inspected the several alterations and improvements made in the said messuage by the said C. D., and having heard the allegations and evidence of both the said parties concerning the matters so referred to us as aforesaid, do make and publish this our award of and concerning the same in manner following, that is to say, &c.

## No. XXXIV.

# Commencement of an Umpirage.

To all to whom, &c., I, X. Y. of, &c. send greeting. WHEREAS by an agreement in writing, dated the ——— day of ----, and made between A. B. of, &c. of the one part, and C. D. of, &c. of the other part; after reciting that certain disputes and differences had arisen and were then depending between the said parties, it was agreed that the said disputes and differences should be referred to the award and final determination of E. F. of, &c., and G. H. of, &c., and in case they should not agree to the award of such person as the said arbitrators should by writing under their hands appoint as umpire, and that the decision of such umpire on the matters referred should be final, so that &c. [recite time for making award, the power to enlarge and other powers justifying the subsequent recitals and directions]. AND WHEREAS the said arbitrators took upon themselves the burthen of the said reference, and by writing under their hands duly appointed me, X. Y., to be an umpire in accordance with the said agreement. AND WHEREAS the said arbitrators differed and were unable to agree upon the matters so referred to them as aforesaid, and thereupon the said disputes and differences were referred to me for my award and determination thereon as umpire. AND WHEREAS I the said X. Y. did, by two several memoranda in writing under my hand, indorsed on the said agreement, enlarge the time for making my umpirage and award until the ---- day of - next. Now know ye that I, the said X. Y., having taken upon myself the burthen of the said reference and umpirage, and having heard, examined, and considered the allegations, witnesses and evidence of both the said parties concerning the premises, and done and performed all things necessary to enable me to make my umpirage and award of and concerning the said disputes and differences and the matters referred as aforesaid, do make and publish this my umpirage and award of and concerning the same in manner following, that is to say, &c.

#### No. XXXV.

Recital of Enlargement of Time by Consent of the Parties.

# No. XXXVI.

Recital of Enlargement of Time by several Rules of Court.

AND WHEREAS the time for making and publishing my award, in pursuance of the said recited order, hath, by several rules of the said Court of ———, made from time to time, by and with the consent of the said parties, been and the same now stands enlarged, until the ———— day of this present term.

## No. XXXVII.

Award on a general Reference by a Mortgagor and Mortgagee,—Mortgagor to pay a Sum in full of all Demands,—Estates to be reconveyed and Mortgagor to be let into Possession and receive Arrears of Rent,—Mortgagee to give a general Release.

now last past, being the day of the date of the said recited submission); not only on account of all principal money and interest due to her, for or in respect of any mortgages, bonds, notes, or other securities whatsoever, at any time theretofore made, given or otherwise executed by or between the said C. D. and A. B., or either of them, of or concerning any leasehold messuages, cottages, dwelling-houses, tenements, closes and hereditaments, situate, standing, lying and being - aforesaid, or elsewhere in the said county of -; and which are mentioned and comprised in a certain indenture of lease or demise bearing date on or about - day of — 19 , and made and executed by [lessor], of, &c., unto the said C. D.; but also in satisfaction and discharge of and for all costs, charges and expenses whatsoever that have accrued or happened to or unto her the said A. B. touching or concerning any such mortgages, securities, suit or suits, action or actions, or other cause, matter or thing whatsoever at any time before the said [twentyfirst day of [March] now last past, depending between the said C. D. and A. B. And we do hereby further award. order and declare, that on payment of the said sum of one hundred pounds by the said C. D. to the said A. B., her executors, administrators or assigns, on the day and at the time and place aforesaid, she the said A. B. shall and do, at the expense of the said C. D., his heirs, executors, administrators or assigns, not only seal and deliver unto the said C. D., his heirs, executors or administrators, a good and effectual deed of assignment of all those two messuages, &c., situate, lying, ---- aforesaid; and also of all those several closes of land, &c.; or to any person or persons he or they may appoint, for and during all the rest, residue and remainder of the term and terms of years, and other her estate and interest therein and thereunto; but also shall and do, on the day and at the time and place aforesaid, deliver or cause to be delivered unto the said C. D., his heirs, executors, administrators or assigns, all deeds, evidences and writings whatsoever in her custody, power or possession, or in the custody, power or possession of any other person or persons whomsoever, and which she can obtain or come at without suit at law or in equity, which relate to or concern the said

leasehold messuages, closes of land and premises, or any part or parcel thereof. And we do hereby further order and award that the said C. D., his heirs, executors, administrators, or assigns, shall be let into the quiet and peaceable possession of all and singular the said leasehold premises so hereby awarded to be assigned by the said A. B. to the said C. D., his heirs, executors, administrators or assigns as aforesaid on the said [third] day of [December] now next: And that he the said C. D., his heirs, executors, administrators or assigns, shall be entitled unto and have, receive and take all arrears of rent of the said premises so intended to be assigned by the said A. B., her executors or administrators unto the said C. D., his heirs, executors, administrators or assigns as aforesaid, as now is, and shall be on the said [third] day of [December] next, in the hands of the present tenants thereof. And we do hereby also order and award that the said C. D., his heirs, executors or administrators, shall and do pay, or cause to be paid, all such costs, charges and expenses as at any time before the said [twenty-first] day of [March] now last past have happened or been occasioned by or by reason or means, or upon account of, any suit or suits, action or actions, either at law or in equity, depending by or between them the said C. D. and A. B. AND we do hereby further order and award, that she the said, A. B. shall, upon receiving the said sum of one hundred pounds, execute unto the said C. D., his heirs, executors and administrators, a good and sufficient release of all and all manner of action and actions, cause and causes of action, bills, bonds, writings and obligations, notes, acknowledgments, powers, provisoes, dues, duties, reckonings, accounts, sum and sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, for or by reason or means of any matter, cause or thing whatsoever, both at law or in equity. or otherwise howsoever, which against the said C. D. she the said A. B. ever had or now hath or which she the said A. B. her heirs, executors or administrators, shall or may have, claim, challenge, or demand, for or by reason or means of any act, cause or thing whatsoever, from the beginning of the world to the said [twenty-first] day of [March] now last past, being the day of the date of the said submission.

## No. XXXVIII

Award that a Partnership be dissolved, A. B. to receive all Co-partnership Debts, and use C. D.'s Name in any Action; A. B. to pay all Demands on the Co-partnership and indemnify C. D. therefrom; C. D. to deliver up all Co-partnership Books and accept a certain Sum in full of all Demands.

Now know ye, that I, &c., having, &c., do make this my award of and concerning the matters so referred to me as aforesaid, in manner following: that is to say: -First, I do award and adjudge, that the said partnership shall be deemed and taken to have ended and been determined on and from - day of - Secondly, I do award and direct, that the said A.B., his executors or administrators, shall and may demand, have and receive to his or their own use, without the interference of the said C. D., all debts due and owing to the said co-partnership, from any person whomsoever: And shall and may use the name of the said C. D. in any action or suit to be commenced for the recovery of any Thirdly, I do award and direct, that such debt or demand. the said A. B., his executors or administrators, shall and do bear, pay, and discharge, all debts, demands, damages, and claims whatsoever, due or owing by, or which any person hath or can make against the said co-partnership, or the said C. D. in respect thereof: And shall and do indemnify and keep harmless the said C. D. from and against all such debts, demands, damages, and claims; and from and against any loss or damage that may be incurred or sustained by the said C. D., by reason of his name being used in any such action or suit so to be commenced as aforesaid, in pursuance of the authority hereby given to the said A. B., his executors and administrators. Fourthly, I do award and direct, that the said C. D. shall and do, at any time or times, upon the request of the said A. B., his executors or administrators, deliver up to the said A. B., his executors or administrators, all and every the books, papers, and writings which may be in the custody, power, or possession of him the said C. D. in

# No. XXXIX.

Award on a Reference between Landlord and Tenant, finding that certain Covenants have been broken, and ordering Payment of a Sum in respect thereof.

Now know ye, that I, &c. having, &c., do make this my award of and concerning the matters so referred to me as aforesaid, in manner following, that is to say: First, I adjudge and award, that the said A. B. [lessee] has not performed and fulfilled the several covenants contained in the lease of the said farm for laying a certain quantity of lime and bone manure thereupon, for scouring and ditching, for repairing the farm buildings, hedges and fences, and for managing certain portions of the said farm according to the four-years course of husbandry. Secondly, I adjudge and award, that the said A. B. has not performed and fulfilled the covenants in the said lease for keeping in repair a fence separating a field called the Higher Lea, part of the said farm, from the park lands of the said C. D. [lessor], in consequence whereof cattle being depastured in the said Higher Lea have strayed into the said park lands. Thirdly, I adjudge and award, that the said C. D. has sustained damages to the extent of £\_\_\_\_, by reason of the breaches hereinbefore mentioned of the several covenants contained in the said lease. [Add direction to pay that amount, and award as to costs.

## No. XL.

Each Party to pay his own Costs of Reference and one-half the Costs of Award.

I award that each of the said parties shall and do bear and pay his own costs of this reference; and that the costs of this my award be paid in equal moieties between them.

## No. XLI.

Costs of Reference and Award to be paid in equal Moieties.

I award that the costs and charges of this reference and the charges of making this my award shall be paid and borne by the said A. B. and C. D. in equal moieties.

# No. XLII.

Certificate for Special Jury, &c.

I do certify that this cause was proper to be tried before a special jury [or before a judge of the superior courts, and not before the sheriff, or a judge of an inferior court: or that the action was brought to try a right other than the mere right to recover damages].

## No. XLIII.

# Mutual Releases if required.

And I further award that upon payment of the said sum of £——— to the said A. B., as aforesaid, they, the said A. B. and C. D., if required, shall respectively, at the costs and charges of the party requiring the same, execute, each unto the other of them, mutual general releases of all and all manner of action and actions, cause and causes of action, claims and demands whatsoever, from the beginning of the world until the date of the said submission.

#### No. XLIV.

One Party to execute a Release on Payment of Money by the other Party.

# No. XLV.

Release at the Cost of the Party released.

And that, upon payment of the said sum, the said A. B. shall, if required so to do by, and at the cost of, the said C. D., execute and deliver to him the said C. D. a valid and effectual release of, &c.

#### No. XLVI.

Award on the several Issues in a Cause.

As to the issues firstly and thirdly joined in this cause, I award and find for the plaintiff; and as to the issue secondly joined in the cause, I award and find for the defendant.

## No. XLVII.

Award on a Plea of nonassumpsit.

As to the issue firstly joined in this cause, I award and find, that the defendant did promise in the manner and form as by the plaintiff, in the declaration, is alleged; and I assess the plaintiff's damages by reason of the non-performance of the said promise at  $\pounds$ ——, which sum I direct the defendant to pay to the plaintiff.

#### No. XLVIII.

Award on a Plea of nunquam indebitatus.

As to the issue joined in this cause, I award and find, that the defendant never was indebted to the plaintiff in the sum in the declaration mentioned or in any part thereof.

# No. XLIX.

# Award on a Plea of non est factum.

As to the issue joined in this cause, I award and find, that the indenture is the deed of the defendant in manner and form as the plaintiff has alleged; and I assess the damages of the plaintiff by reason of the breaches of covenant alleged in the declaration at £———, which sum I direct the defendant to pay to the plaintiff.

# No. L.

# Award of Verdict for the Defendant

## No. LI.

# Award in Ejectment.

I award and adjudge, that the plaintiff in this action is entitled to the possession of the lands sought to be recovered in this action: and I assess the plaintiff's damages at one shilling [or, that the plaintiff in this action is entitled to the possession of a certain parcel of the lands sought to be recovered in this action, that is to say [description], which said parcel is delineated and coloured pink in the map annexed to and intended to form part of this my award: and I assess the plaintiff's damages at one shilling. And

I further award and adjudge, that the plaintiff is not entitled to the possession of the residue of the said lands, consisting of [description], which residue is delineated and coloured green in the said map. And I further award and adjudge that the defendant is entitled to the possession of the said residue].

## No. LII.

# Award of a Conveyance of Freeholds.

I award and direct, that the said C. D. shall, within one calendar month from the date hereof, execute a good and effectual conveyance and assurance in fee simple, of all, &c. [describing the parcels], unto the said A. B., his heirs and assigns, and that the said A. B. shall, at his own costs, prepare, and tender for execution by the said C. D., the said conveyance and assurance.

# No. LIII.

# Award of an Assignment of a Lease.

I award and direct, that for and in consideration of the sum of £ heretofore paid by the said C. D. to the said A. B., and of the further sum of £\_\_\_\_, which is hereby directed to be paid by the said C. D. to the said A. B., upon the execution of the deed of assignment hereinafter mentioned, the said A. B. shall, on the ——— day of ———, at the office of ----, the attorney for the plaintiff in the said action, situate at, &c., between the hours of twelve o'clock at noon and two o'clock in the afternoon, by a legal and valid deed of assignment, sell, assign, transfer, and set over, all his right, title and interest in the unexpired residue of a term of years of a lease granted by one H. G. to the said A. B. of certain premises at a yearly rent of £---- per annum, and heretofore occupied by the said A. B. and T. T., as a smith's shop and wareroom, situate and being at, &c. to the said C. D., subject, nevertheless, to the covenants and conditions therein contained. And I further award and direct,

# No. LIV.

# Award to deliver up a Bond to be cancelled.

I award that a certain bond or obligation for the sum of £——, given by the said A. B. to the said C. D., on account of, &c., be delivered up by the said C. D. to the said A. B. to be cancelled, or that a proper release be given for the same in case such bond or obligation should appear to have been lost or mislaid.

## No. LV.

# Award of a Wall to be built.

I award that the said A. B. shall, within one calendar month from the date hereof, at his own expense erect and make a sufficient fence or wall of brick of the thickness or breadth of nine inches at least, and of the height of six feet, extending from that corner of his garden marked with the letter A on the plan appended to and intended to form part of this my award to that corner of the stable in the occupation of the said C. D., which is marked with the letter C on the said plan, according to a line drawn in red ink on the said plan.

#### No. LVI.

# Award of a Wall to be pulled down.

I award and determine, that the wall of brick, intended to form the gable end of a building now being erected and built by the said C. D., extends six inches beyond the property of the said C. D. on to the property of the said A. B. And I further award and direct, that the C. D. do and shall,

within one calendar month from the date hereof, pull or take down the said brick wall; and that he shall and may, at any time thereafter, erect a fresh wall, in a line parallel with the said existing wall, but so that the outside thereof shall be at least six inches to the north east of the outside of the said existing wall.

# No. LVII.

Award of Manner in which a Weir is to be maintained in future.

I award and determine, that the defendant is entitled to keep and maintain his said weir of the depth of fourteen inches and no more; and for the purpose of defining, denoting and perpetuating the limit of the said depth at which the defendant is entitled to keep and maintain his said weir as aforesaid, I have caused to be placed certain marks and erections near the said weir, and I declare that the said marks and erections correctly denote and define the depth at which the defendant is entitled to maintain the said weir. And I further award and declare that the map or plan hereunto annexed and signed by me defines and describes the depth of the said weir and the said marks and erections so caused to be placed by me, as aforesaid, for perpetuating, denoting and defining the same. And I do further award and order, that the costs and charges incurred by placing the said marks and erections be borne by the defendant, and that they be for ever hereafter kept in repair and maintained by the defendant.

## No. LVIII.

Award that one Party has no Interest in the Subject of Reference.

I award that the said C. D. hath not, nor at any time whensoever had, any interest, right, title, claim or demand whatsoever in, to or in respect of the said ship or vessel.

#### No. LIX.

Award that the Property in Premises is in one Party, subject to an Easement of the other Party.

I award that the said passage, yard and pump are the property of the said A. B., subject to the right of the said C. D. to the free use of water from the said pump in common with the said A. B., and of ingress and regress into and out of the said yard by and over the said stile, for the purpose of fetching water therefrom, and for all other purposes, at his own free will and pleasure. And I also award that the said pump shall in future be repaired at the joint expense of the said A. B. and C. D.

(And see Boodle v. Davies, 3 A. & E. 200, for similar forms.)

#### No. LX.

Certificate of an Arbitrator when a Verdict is taken subject to his Certificate.

In the Q. B. [C. P. or Exch. of Pleas].

A. B. v. C. D.

I hereby certify that the verdict which has been entered for the plaintiff do stand, but that the damages be reduced to  $\pounds$ ———.

M. N. [Arbitrator].

To \_\_\_\_\_ [Associate].

## No. LXI.

Award on a former Award being sent back to the Arbitrator for his Reconsideration.

 In witness, &c.

[For precedent of an amendment in the name alone by indorsement on the former award, see *Howett* v. *Clements*, 1 C. B. 128; *Davies* v. *Pratt*, 17 C. B. 173.]

## PART II.

#### STATUTES.

# 9 & 10 WILL, III. c. 15.

# An Act for determining Differences by Arbitration.

WHEREAS, it hath been found by experience, that references made by rule of court have contributed much to the ease of the subject, in the determining of controversies, because the parties become thereby obliged to submit to the award of the arbitrators, under the penalty of imprisonment for their contempt in case they refuse submission; now, for promoting trade, and rendering the awards of arbitrators the more effectual in all cases, for the final determination of controversies referred to them by merchants and traders, or others, concerning matters of account or trade, or other matters: be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in parliament assembled, and by authority of the same, that from and after the eleventh day Merchants and of May, which shall be in the year of our Lord one thousand traders, &c. six hundred and ninety-eight, it shall and may be lawful for that their suball merchants and traders, and others, desiring to end any mission to controversy, suit or quarrel, controversies, suits or quarrels, made rule of for which there is no other remedy but by personal action or court. suit in equity, by arbitration, to agree that their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of His Majesty's courts of record which the parties shall choose, and to insert such their agreement in their submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons; which agreement being so made and inserted in their submission, or promise, or condition of their respective

Regulations thereupon.

bonds, shall or may, upon producing an affidavit thereof made by the witnesses thereunto, or any one of them, in the court of which the same is agreed to be made a rule, and reading and filing the said affidavit in court, be entered of record in such court, and a rule shall thereupon be made by the said court, that the parties shall submit to and finally be concluded by the arbitration or umpirage which shall be made concerning them by the arbitrators or umpire, pursuant to such submission; and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court, when he is a suitor or defendant in such court; and the court on motion shall issue process accordingly, which process shall not be stopped or delayed in its execution by any order, rule, command, or process of any other court, either of law or equity, unless it shall be made appear on oath to such court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration or umpirage was procured by corruption, or other undue means.

Penalty.

Exception.

Corrupt arbitration void. 2. And be it further enacted by the authority aforesaid, that any arbitration or umpirage procured by corruption or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage before the last day of the next term after such arbitration or umpirage made and published to the parties; anything in this act contained to the contrary notwithstanding.

3 & 4 WILL. IV. c. 42, ss. 39-41.

An Act for the further Amendment of the Law, and the better Advancement of Justice.

Submission to arbitration by rule of court, &c. not to be 39. "And whereas it is expedient to render references to arbitration more effectual;" be it further enacted, that the power and authority of any arbitrator or umpire appointed

by or in pursuance of any rule of court, or judge's order, or revocable withorder of nisi prius, in any action now brought, or which shall out leave of be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of His Majesty's courts of record, shall not be revocable by any party to such reference without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the court, or any judge thereof, may from time to time enlarge the time for any such arbitrator making his award.

40. And be it further enacted, that when any reference Power to comshall have been made by any such rule or order as aforesaid, pel the atten-dance of witor by any submission containing such agreement as aforesaid, nesses. it shall be lawful for the court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served either together with, or after the service of such rule or order; provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money, and payment of expenses and for loss of time, as for and upon attendance at any trial; provided also, that the application made to such court or judge for such rule or order shall set forth the county where such witness is residing at the time, or satisfy such court or judge that such person cannot be found: provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compelled to

produce at a trial, or to attend at more than two consecutive days, to be named in such order.

Power for the arbitrators under a rule of court to administer an oath.

41. And be it further enacted, that when in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrators or umpire, or any one arbitrator, and he or they are hereby authorized and required, to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly.

# 8 & 9 Vict. c. 18, ss. 23-37.

An Act for consolidating in one Act certain Provisions usually inserted in Acts authorizing the taking of Lands for Undertakings of a Public Nature.

Compensation exceeding 50l. to be settled by arbitration or jury, at the option of the party claiming compensation.

23. If the compensation claimed or offered in any such case shall exceed fifty pounds, and if the party claiming compensation desire to have the same settled by arbitration, and signify such desire by notice in writing to the promoters of the undertaking, before they have issued their warrant to the sheriff to summon a jury in respect of such lands, under the provisions hereinafter contained, stating in such notice the nature of the interest in respect of which such party claims compensation, and the amount of the compensation so claimed, the same shall be so settled accordingly; but unless the party claiming compensation shall as aforesaid signify his desire to have the question of such compensation settled by arbitration, or if when the matter shall have been referred to arbitration the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation

shall be settled by the verdict of a jury, as hereinafter provided.

24. It shall be lawful for any justice, upon the application Method of proof either party with respect to any question of disputed compensation by this or the special act, or any act incorporated putes as to therewith, authorized to be settled by two justices, to summon the other party to appear before two justices, at a time and place to be named in the summons, and upon the appearance of such parties, or in the absence of any of them, upon proof of due service of the summons, it shall be lawful for such justices to hear and determine such question, and for that purpose to examine such parties or any of them, and their witnesses, upon oath, and the costs of every such inquiry shall be in the discretion of such justices, and they shall settle the amount thereof.

ceeding for settling discompensation by justices.

25. When any question of disputed compensation by this Appointment or the special act, or any act incorporated therewith, authorized or required to be settled by arbitration, shall have are to be dearisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred; and every appointment of an arbitrator shall be made on the part of the promoters of the undertaking under the hands of the said promoters or any two of them, or of their secretary or clerk, and on the part of any other party under the hand of such party, or if such party be a corporation aggregate under the common seal of such corporation; and such appointment shall be delivered to the arbitrator, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if, for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party

when questions arbitration.

making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbitrator shall be final.

Vacancy of arbitrator to be supplied.

26. If, before the matters so referred shall be determined, any arbitrator appointed by either party die, or become incapable, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place, and if, for the space of seven days after notice in writing from the other party for that purpose, he fail to do so, the remaining or other arbitrator may proceed ex parte; and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death or disability as aforesaid.

Appointment of umpire.

27. Where more than one arbitrator shall have been appointed such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special act, and if such umpire shall die, or become incapable to act, they shall forthwith after such death or incapacity appoint another umpire in his place, and the decision of every such umpire on the matters so referred to him shall be final.

Board of Trade empowered to appoint an umpire on neglect of the arbitrators, in case of railway companies. 28. If in either of the cases aforesaid the said arbitrators shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an umpire, the Board of Trade, in any case in which a railway company shall be one party to the arbitration, and two justices in any other case, shall, on the application of either party to such arbitration, appoint an umpire, and the decision of such umpire on the matters on which the arbitrators shall differ, or which shall be referred to him under this or the special act, shall be final.

In case of death of single arbitrator the 29. If, when a single arbitrator shall have been appointed, such arbitrator shall die or become incapable to act before he shall have made his award, the matters referred to him

shall be determined by arbitration under the provisions of matter to begin this or the special act in the same manner as if such arbitrator had not been appointed.

30. If, where more than one arbitrator shall have been If either arbiappointed, either of the arbitrators refuse or for seven days trator refuse to act, the other neglect to act, the other arbitrator may proceed ex parte, to proceed ex and the decision of such other arbitrator shall be as effectual parte. as if he had been the single arbitrator appointed by both parties.

31. If, where more than one arbitrator shall have been If arbitrators appointed, and where neither of them shall refuse or neglect fail to make to act as aforesaid, such arbitrators shall fail to make their within twentyaward within twenty-one days after the day on which the one days, the last of such arbitrators shall have been appointed, or within the umpire. such extended time (if any) as shall have been appointed for that purpose by both such arbitrators under their hands. the matters referred to them shall be determined by the umpire to be appointed as aforesaid.

matter to go to

32. The said arbitrators or their umpire may call for the Power of arbiproduction of any documents in the possession or power of trators to call for books, &c. either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose.

33. Before any arbitrator or umpire shall enter into the Arbitrator or consideration of any matters referred to him, he shall in the umpire to make presence of a justice make and subscribe the following declaration; that is to say,

a declaration.

"I, A. B., do solemnly and sincerely declare, That I will faithfully and honestly, and to the best of my skill and ability, hear and determine the matters referred to me under the provisions of the act [naming the special act].

A. B.

,,,

"Made and subscribed in the presence of

And such declaration shall be annexed to the award when made; and if any arbitrator or umpire having made such declaration shall wilfully act contrary thereto, he shall be

guilty of a misdemeanor.

34. All the costs of any such arbitration, and incident Costs of arbithereto, to be settled by the arbitrators, shall be borne by tration how to

the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions.

Award to be delivered to the promoters of the undertaking.

35. The arbitrators shall deliver their award in writing to the promoters of the undertaking, and the said promoters shall retain the same, and shall forthwith, on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times, on demand, produce the said award, and allow the same to be inspected or examined by such party or any person appointed by him for that purpose.

Submission may be made a rule of court.

- 36. The submission to any such arbitration may be made a rule of any of the superior courts, on the application of either of the parties.
- Award not void through error in form.
- 37. No award made with respect to any question referred to arbitration under the provisions of this or the special act shall be set aside for irregularity or error in matter of form.

# 17 & 18 Vict. c. 125, ss. 3—17.

An Act for the further Amendment of the Process, Practice and Mode of Pleading in and enlarging the Jurisdiction of the Superior Courts of Common Law at Westminster, and of the Superior Courts of Common Law of the Counties Palatine of Lancaster and Durham.

Power to court or judge to direct arbitration before trial. 3. If it be made appear, at any time after the issuing of the writ, to the satisfaction of the court or a judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such court or judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an

officer of the court, or, in country causes, to the judge of any county court, upon such terms as to costs and otherwise, as such court or judge shall think reasonable; and the decision or order of such court or judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matter referred.

4. If it shall appear to the court or a judge that the Special case allowance or disallowance of any particular item or items in and question of such account depends upon a question of law fit to be decided fact tried. by the court, or upon a question of fact fit to be decided by a jury, or by a judge upon the consent of both parties as hereinbefore provided, it shall be lawful for such court or judge to direct a case to be stated, or an issue or issues to be tried; and the decision of the court upon such case and the finding of the jury or judge upon such issue or issues shall be taken and acted upon by the arbitrator as conclusive.

5. It shall be lawful for the arbitrator upon any compul- Arbitrator may sory reference under this act, or upon any reference by state special consent of parties where the submission is or may be made a rule or order of any of the superior courts of law or equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the court.

6. If upon the trial of any issue of fact by a judge under Power to judge this act it shall appear to the judge that the questions arising to direct arbithereon involve matter of account which cannot conveniently of trial, when be tried before him, it shall be lawful for him, at his discretion, to order that such matter of account be referred to an sion. arbitrator appointed by the parties, or to an officer of the court, or, in country causes, to a judge of any county court, upon such terms as to costs, and otherwise, as such judge shall think reasonable; and the award or certificate of such referee shall have the same effect as hereinbefore provided as to the award or certificate of a referee before trial; and it shall be competent for the judge to proceed to try and dis-

pose of any other matters in question, not referred in like manner, as if no reference had been made.

Proceedings before and power of such arbitrator. 7. The proceedings upon any such arbitration as afore-said shall, except otherwise directed hereby or by the sub-mission or document authorizing the reference, be conducted in like manner, and subject to the same rules and enactments, as to the power of the arbitrator and of the court, the attendance of witnesses, the production of documents, enforcing or setting aside the award, and otherwise, as upon a reference made by consent under a rule of court or judge's order.

Power to send back to arbitrator. 8. In any case where reference shall be made to arbitration as aforesaid the court or a judge shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the re-consideration and re-determination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said court or judge may seem proper.

Application to set aside the award.

9. All applications to set aside any award made on a compulsory reference under this act shall and may be made within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term; and if no such application is made, or if no rule is granted thereon, or if any rule granted thereon is afterwards discharged, such award shall be final between the parties.

Enforcing of awards within period for setting them aside. 10. Any award made on a compulsory reference under this act may, by authority of a judge, on such terms as to him may seem reasonable, be enforced at any time after seven days from the time of publication, notwithstanding that the time for moving to set it aside has not elapsed.

If action commenced by one party after all have agreed to arbitration, court or judge may stay proceedings. 11. Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under

him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the court in which action or suit is brought, or a judge thereof, on application by the defendant or defendants or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such court or judge may seem fit: provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require.

12. If in any case of arbitration the document authorizing On failure of the reference provide that the reference shall be to a single parties or arbiarbitrator, and all the parties do not, after differences have may appoint arisen, concur in the appointment of an arbitrator; or if any single arbitraappointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one; or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator; or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorizing the reference do not show that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one; then in every such instance any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if within seven clear days after such notice shall have been served no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any judge of any of the superior courts of law or equity at Westminster, upon summons to be taken out by the party

trators, judge tor or umpire. having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be, and such arbitrator, umpire, and third arbitrator respectively shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties.

When reference is to two arbitrators and one party fail to appoint, other party may appoint arbitrator to act alone.

13. When the reference is or is intended to be to two arbitrators, one appointed by each party, it shall be lawful for either party, in the case of the death, refusal to act, or incapacity of any arbitrator appointed by him, to substitute a new arbitrator, unless the document authorizing the reference show that it was intended that the vacancy should not be supplied; and if on such a reference one party fail to appoint an arbitrator, either originally, or by way of substitution as aforesaid, for seven clear days after the other party shall have appointed an arbitrator, and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference, and an award made by him shall be binding on both parties as if the appointment had been by consent; provided, however, that the court or a judge may revoke such appointment, on such terms as shall seem just.

Two arbitrators may appoint umpire. 14. When the reference is to two arbitrators, and the terms of the document authorizing it do not show that it was intended that there should not be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award, unless they be called upon by notice as aforesaid to make the appointment sooner.

Award to be made in three months, unless parties or court enlarge time.

15. The arbitrator acting under any such document or compulsory order of reference as aforesaid, or under any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party, but the parties may by consent in writing enlarge the term for making the award;

and it shall be lawful for the superior court of which such submission, document, or order is or may be made a rule or order, or for any judge thereof, for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the award; and if no period be stated for the enlargement in such consent or order for enlargement, it shall be deemed to be an enlargement for one month; and in any case where an umpire shall have been appointed, it shall be lawful for him to enter on the reference in lieu of the arbitrators, if the latter shall have allowed their time or their extended time to expire without making an award, or shall have delivered to any party or to the umpire a notice in writing stating that they cannot agree.

16. When any award made on any such submission, docu- Rule to deliver ment, or order of reference as aforesaid directs that possession of land pursuant sion of any lands or tenements capable of being the subject to award to be of an action of ejectment shall be delivered to any party, enforced as a either forthwith or at any future time, or that any such party ejectment. is entitled to the possession of any such lands or tenements, it shall be lawful for the court of which the document authorizing the reference is or is made a rule or order to order any party to the reference who shall be in possession of any such lands or tenements, or any person in possession of the same claiming under or put in possession by him since the making of the document authorizing the reference, to deliver possession of the same to the party entitled thereto, pursuant to the award; and such rule or order to deliver possession shall have the effect of a judgment in ejectment against every such party or person named in it, and execution may issue, and possession shall be delivered by the sheriff as on a judgment in ejectment.

17. Every agreement or submission to arbitration by con- Agreement or sent, whether by deed or instrument in writing not under submission in seal, may be made a rule of any one of the superior courts made rule of of law or equity at Westminster, on the application of any court, unless a party thereto, unless such agreement or submission contain contrary intenwords purporting that the parties intend that it should not be made a rule of court; and if in any such agreement or submission it is provided that the same shall or may be made a rule of one in particular of such superior courts, it may be

made a rule of that court only; and if when there is no such provision a case be stated in the award for the opinion of one of the superior courts, and such court be specified in the award, and the document authorizing the reference have not, before the publication of the award to the parties, been made a rule of court, such document may be made a rule only of the court specified in the award; and when in any case the document authorizing the reference is or has been made a rule or order of any one of such superior courts, no other of such courts shall have any jurisdiction to entertain any motion respecting the arbitration or award.

#### 22 & 23 Vict. c. 59.

An Act to enable Railway Companies to settle their Differences with other Companies by Arbitration.

For the better providing for the settlement by arbitration of matters in which railway companies in the United Kingdom are mutually interested, be it enacted, by (&c. &c.), as follows: (that is to say,)

Short title.
"Railway companies."

- 1. This act may for all purposes be cited as "Railway Companies Arbitration Act, 1859;" and the expression "railway companies" in this act extends to and includes all persons being the owners or lessees of, and all contractors working, any railway upon which steam power is used.
- Power for railway companies to refer matters to arbitration.
- 2. Any two or more railway companies, whether already or hereafter incorporated (in this act called "the companies"), from time to time, by writing under their respective common seals, may agree to refer and may refer to arbitration, in accordance with this act, any then existing or future differences, questions, or other matters whatsoever in which they then are or thereafter shall be mutually interested, and which they might lawfully settle or dispose of by agreement between themselves, and may delegate to the person or persons to whom the reference is made any power to determine all or any of the terms of any contract to be made between the companies which the directors of the companies respectively

might lawfully delegate to any committees of themselves respectively.

3. The companies jointly, but not otherwise, from time to Power to alter time, by writing under their respective common seals, may or revoke agreements for add to, alter, or revoke any agreement for reference in ac-reference. cordance with this act theretofore entered into between the companies, or any of the terms, conditions, or stipulations thereof.

4. Every reference or agreement in accordance with this Agreements to act, except so far as it is from time to time revoked or modi- be carried into effect. fied in accordance with this act, shall bind the companies, and may and shall be carried into full effect.

5. Where the companies agree, the reference shall be made Reference to a to a single arbitrator.

single arbitra-

6. Except where the companies agree that the reference Reference to shall be made to a single arbitrator, the reference shall be two or more made as follows; to wit,

arbitrators.

Where there are two companies the reference shall be made to two arbitrators:

Where there are three or more companies the reference shall be made to so many arbitrators as there are companies.

7. Where there are to be two or more arbitrators, every Appointment company shall by writing under their common seal appoint of arbitrators one of the arbitrators, and shall give notice in writing thereof to the other company or companies.

by companies.

8. Where there are to be two or more arbitrators, if any of Appointment the companies fail to appoint an arbitrator within fourteen of arbitrators by board of days after being thereunto requested in writing by the other trade. company, or by the other companies or any of them, then, on the application of the companies or any of them, the Board of Trade, instead of the company so failing to appoint an arbitrator, may appoint an arbitrator; and the arbitrator so appointed shall for the purposes of this act be deemed to be appointed by the company so failing.

9. When the reference is made to two or more arbitrators, Appointment if before the matters referred to them are determined any of arbitrators by companies arbitrator dies, or becomes incapable or unfit, or for seven to supply vaconsecutive days fails to act as arbitrator, the company by cancies.

which he was appointed shall by writing under their common seal appoint an arbitrator in his place.

Appointment of arbitrators by board of vacancies.

10. Where the company by which an arbitrator ought to be appointed in the place of the arbitrator so deceased, trade to supply incapable, unfit, or failing to act, fail to make the appointment within fourteen days after being thereunto requested in writing by the other company, or by the other companies or any of them, then, on the application of the companies or any of them, the Board of Trade may appoint an arbitrator; and the arbitrator so appointed by the Board of Trade shall for the purposes of this act be deemed to be appointed by the company so failing.

Appointment of arbitrator not revocable.

11. When any appointment of an arbitrator is made, the company making the appointment shall have no power to revoke the appointment, without the previous consent in writing of the other company or every other company in writing under their common seal.

Appointment of umpire by arbitrators.

12. Where two or more arbitrators are appointed, they shall, before entering on the business of the reference, appoint by writing under their hands an impartial and qualified person to be their umpire.

Appointment of umpire by board of trade.

13. If the arbitrators do not appoint an umpire within seven days after the reference is made to the arbitrators, then, on the application of the companies, or any of them, the Board of Trade may appoint an umpire; and the umpire so appointed shall for the purposes of this act be deemed to be appointed by the arbitrators.

Appointment. of umpire by arbitrators to supply vacancy.

14. Where two or more arbitrators are appointed, if before the matters referred to them are determined their umpire dies, or becomes incapable or unfit, or for seven consecutive days fails to act as umpire, the arbitrators shall by writing under their hands appoint an impartial and qualified person to be their umpire in his place.

Appointment of umpire by board of trade to supply vacancy.

15. If the arbitrators fail to appoint an umpire within seven days after notice in writing to them of the decease, incapacity, unfitness, or failure to act of their umpire, then, on the application of the companies, or any of them, the Board of Trade may appoint an umpire; and the umpire so appointed shall for the purposes of this act be deemed to be appointed by the arbitrators so failing.

16. Every arbitrator appointed in the place of a preceding Succeeding arbitrator, and every umpire appointed in the place of a pre- arbitrators and ceding umpire, shall respectively have the like powers and have powers of authorities as his respective predecessor.

predecessors.

- 17. Where there are two or more arbitrators, if they do Reference to not, within such a time as the companies agree on, or failing such agreement, within thirty days next after the reference is made to the arbitrators, agree on their award thereon, then the matters referred to them, or such of those matters as are not then determined, shall stand referred to their umpire.
- 18. The arbitrator, and the arbitrators, and the umpire Power for respectively may call for the production of any documents arbitrators, &c. or evidence in the possession or power of the companies books, &c. and respectively, or which they respectively can produce, and administer which the arbitrator, or the arbitrators, or the umpire shall think necessary for determining the matters referred, and may examine the witnesses of the companies respectively on oath, and may administer the requisite oath; and in Scotland may grant diligence for the recovery of the documents or evidence, and for citing witnesses, and on application to the lord ordinary he may issue letters of supplement or other necessary writs in support of the diligence.

to call for

19. Except where and as the companies otherwise agree, Procedure in the arbitrator, and the arbitrators, and the umpire respec- the arbitration. tively may proceed in the business of the reference in such manner as he and they respectively shall think fit.

20. The arbitrator, and the arbitrators, and the umpire Arbitration respectively may proceed in the absence of all or any of the may proceed in companies in every case in which, after giving notice in that companies. behalf to the companies respectively, the arbitrator, or the arbitrators, or the umpire shall think fit so to proceed.

21. The arbitrator, and the arbitrators, and the umpire Several awards respectively may, if he and they respectively think fit, make may be made. several awards, each on part of the matters referred, instead of one award on all the matters referred; and every such award on part of the matters shall for such time as shall be stated in the award, the same being such as shall have been specified in the agreement for arbitration, or in the event of no time having been so specified, for any time which the

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#### APPENDIX.

arbitrator may be legally entitled to fix, be binding as to all the matters to which it extends, and as if the matters awarded on were all the matters referred, and that notwithstanding the other matters or any of them be not then or thereafter awarded on.

Awards made in due time to bind all parties. 22. The award of the arbitrator, or of the arbitrators, or of the umpire, if made in writing under his or their respective hand or hands, and ready to be delivered to the companies within such a time as the companies agree on, or, failing such agreement, within thirty days next after the matters in difference are referred to (as the case may be) the arbitrator, or the arbitrators, or the umpire, shall be binding and conclusive on all the companies.

Power for umpire to extend period for making his award. 23. Provided always, that (except where and as the companies otherwise agree) the umpire, from time to time by writing under his hand, may extend the period within which his award is to be made; and if it be made and ready to be delivered within the extended time, it shall be as valid and effectual as if made within the prescribed period.

Awards not to be set aside for informality.

24. No award made on any arbitration in accordance with this act shall be set aside for any irregularity or informality.

Awards to be obeyed.

25. Except only so far as the companies bound by any award in accordance with this act from time to time otherwise agree, all things by every award in accordance with this act lawfully required to be done, omitted, or suffered shall be done, omitted, or suffered accordingly.

Agreements, arbitrations and awards to have effect, 26. Full effect shall be given by all the superior courts of law and equity in the United Kingdom, according to their respective jurisdiction, and by the companies respectively and otherwise, to all agreements, references, arbitrations and awards in accordance with this act; and the performance or observance thereof may, where the courts think fit, be compelled by distress infinite on the property of the companies respectively, or by any other process against the companies respectively or their respective property, that the courts or any judge thereof shall direct, and where requisite frame for the purpose.

Costs of arbitration and

27. Except where and as the companies otherwise agree, the costs of and attending the arbitration and the award shall

be in the discretion of the arbitrator, and the arbitrators, and the umpire respectively.

28. Except where and as the companies otherwise agree, Payment of and if and so far as the award does not otherwise determine, costs. the costs of and attending the arbitration and the award shall be borne and paid by the companies in equal shares, and in other respects the companies shall bear their own respective costs.

29. The submission to any arbitration in accordance with Submission to this act may at any time be made a rule of any of her arbitration to be made a rule Majesty's Superior Courts of Record at Westminster, or, as of court. the case may be, at Dublin, on the application of any party interested; and the court may remit the matter to the arbitrator, or to the arbitrators, or to the umpire, with any directions the court think fit.



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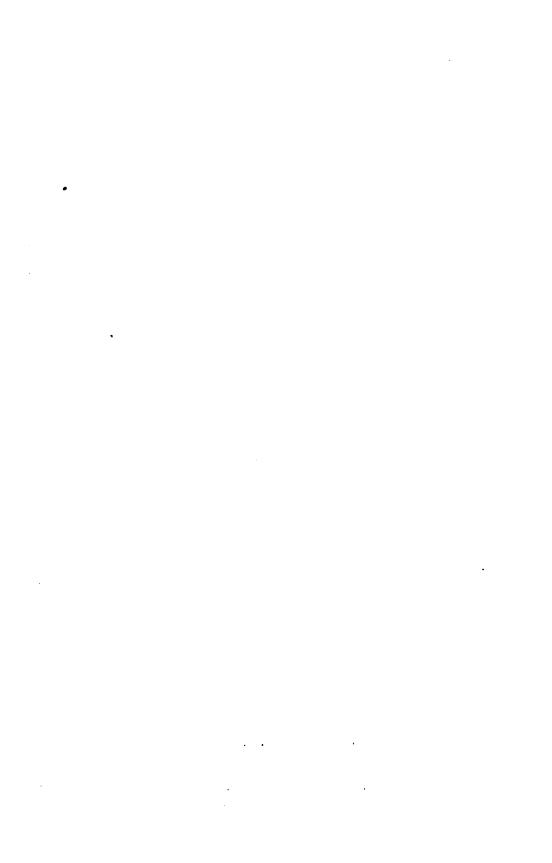
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<sup>&</sup>quot;Now for the Laws of England (if I shall speak my opinion of them without "partiality either to my profession or country), for the matter and nature of them, "I hold them wise, just and moderate laws: they give to God, they give to Casar, "they give to the subject what appertainsth. It is true they are as mixt as our "language, compounded of British, Saxon, Danish, Norman customs. And surely "as our language is thereby so much the richer, so our laws are likewise by that "mixture the more complete." —IOED BAOON.



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